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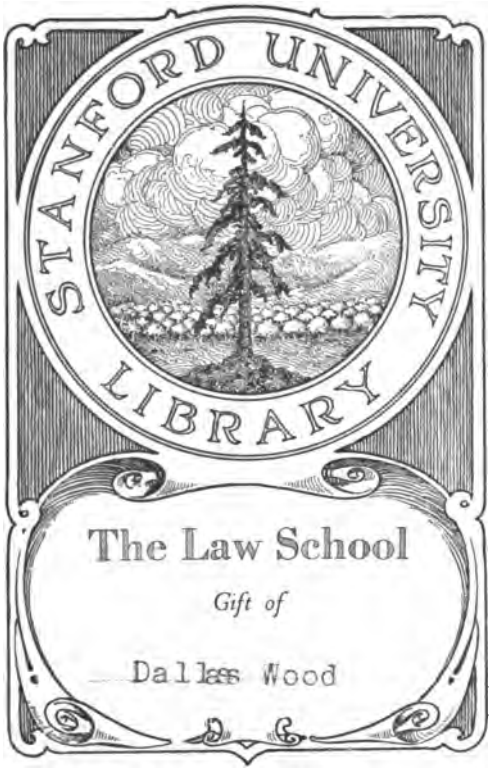
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CASES ON TORTS

SELECTED AND ARRANGED

FOR THE USE OF LAW STUDENTS

IN CONNECTION WITH

BURDICK'S LAW OF TORTS

BY

FRANCIS M. BURDICK

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THIRD EDITION

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STANFORD LAW

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CASES ON TORTS.

INTRODUCTORY CHAPTER

DEFINITION OF TORT.

RICH v. N. Y. C. & H. RIV. R. CO.

(87 N. Y. 382.—1882.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made July 18, 1879, which affirmed a judgment in favor of defendant, entered upon an order nonsuiting plaintiff on trial.

R. W. Van Pelt for appellant.

William Allen Butler for respondent.

FINCH, J. We have been unable to find any accurate and perfect definition of a tort. Between actions plainly *ex contractu* and those as clearly *ex delicto* there exists what has been termed a border-land, where the lines of distinction are shadowy and obscure, and the tort and the contract so approach each other, and become so nearly coincident, as to make their practical separation somewhat difficult. (Moak's Underhill on Torts, 23.) The text writers either avoid a definition entirely (Addison on Torts), or frame one plainly imperfect (2 Bouvier's Law Dict. 600), or depend upon one which they concede to be inaccurate, but hold sufficient for judicial purposes. (Cooley on Torts, 3, note 1; Moak's Underhill, 4; 1 Hilliard on Torts, 1.) By these last authors, a tort is described in general as "a wrong independent of contract." And yet it is conceded that a tort may grow out of, or make part of, or be coincident with a con-

tract (2 Bouvier, *supra*), and that precisely the same state of facts, between the same parties, may admit of an action either *ex contractu* or *ex delicto*. (Cooley on Torts, 90.) In such cases the tort is dependent upon, while at the same time independent of the contract; for, if the latter imposes a legal duty upon a person, the neglect of that duty may constitute a tort founded upon a contract. (1 Addison on Torts, 13.)

Ordinarily, the essence of a tort consists in the violation of some duty due to an individual, which duty is a thing different from the mere contract obligation. When such duty grows out of relations of trust and confidence, as that of the agent to his principal, or the lawyer to his client, the ground of the duty is apparent, and the tort is, in general, easily separable from the mere breach of contract. But where no such relation flows from the constituted contract, and still a breach of its obligation is made the essential and principal means, in combination with other and perhaps innocent acts and conditions, of inflicting another and different injury, and accomplishing another and different purpose, the question whether such invasion of a right is actionable as a breach of contract only, or also as a tort, leads to a somewhat difficult search for a distinguishing test.

In the present case, the learned counsel for the respondent seems to free himself from the difficulty by practically denying the existence of any relation between the parties, except that constituted by the contract itself, and then, insisting that such relation was not of a character to originate any separate and distinct legal duty, argues that, therefore, the bare violation of the contract obligation created merely a breach of contract, and not a tort. He says that the several instruments put in evidence showed that there never had been any relation between the plaintiff and the railroad company, except that of parties contracting in reference to certain specific subjects, by plain and distinct agreements, for any breach of which the parties respectively would have a remedy, but none of which created any such rights as to lay the foundation for a charge of willful misconduct or any other tortious act. Upon this theory the case was tried. Every offer to prove the contracts, and especially their breach, was resisted upon the ground that the complaint, through all its long history of plaintiff's grievances, alleged but a single cause of action, and that for a tort, and, therefore, something else, above and beyond and outside of a mere breach of contract, must

be shown, and proof of such breach was immaterial. From every direction in which the plaintiff approached the allegations of his complaint, the same barrier obstructed his path and excluded his proof. Whatever may be true of the earlier agreements between the plaintiff and the railroad company, and conceding, what seems probable, that the evidence relating to them was properly rejected, on the ground that they left the defendant entirely at liberty to change the site of its depot, so that such change was in no respect either unlawful or wrong; there was yet a later agreement by the terms of which the defendant was bound, as soon as practicable and within a reasonable time, to restore the depot to its old location. The complaint explains the importance of such restoration to the plaintiff. It alleges that valuable property of his, heavily mortgaged, had depreciated in value in consequence of the removal of the depot, and could only be restored to something like its old value, and saved from the sacrifice of a foreclosure in a time of depression, by the prompt return of the depot to its former site. The complaint further avers, that to secure this result, the plaintiff had surrendered valuable riparian rights to the defendant, but the latter, fully understanding the situation, maliciously and willfully broke its agreement, and delayed a restoration of the depot for the express purpose of preventing plaintiff from being enabled to ward off a foreclosure of the mortgage, and itself instigated such foreclosure and caused the ultimate sacrifice. For the breach of this contract to restore the depot within a reasonable time, the plaintiff had a cause of action. But this was not the one with which he came into court. His complaint was for a single cause of action, and that for a tort; and what that alleged tort was, it is quite necessary to know, and in what respect, and how it differs from a mere breach of contract, in order to determine whether the rejected proofs were admissible or not.

That a good cause of action, sounding in tort, was stated in the complaint was not denied upon the trial. Neither by demurrer nor by motion was the sufficiency of the complaint in any manner assailed. The second ground upon which a nonsuit was asked, practically confessed that there was good cause of action, but merely a failure to prove it. The ground stated was, "because the gist of this action is the malicious and unlawful acts of the defendant in pursuing a scheme or plan to injure the plaintiff by depriving him of his property, based upon an alleged malicious violation of certain

alleged contracts; but the proof offered fails to make out any cause of action as set forth in the complaint." The opinion of the General Term distinctly concedes the point, saying, that the facts alleged made out "a clear case of fraud." And on the present appeal the learned counsel for the respondent explicitly admits, in his brief, that it was competent for the plaintiff, under the issue of fact joined by the pleadings, to give evidence of any of the alleged wrongful acts charged in the complaint, as a basis for the claim of damages which he asserted. There was, therefore, something to try; something which was susceptible of proof; a tortious act or omission, or a series of such acts or omissions, properly alleged in the complaint and open to the plaintiff's evidence. Why he was not permitted to have a single one of the forty questions put to his witnesses answered becomes, now, the important inquiry. It will not be necessary to consider them all, for many were excluded for a defect in their form, or because totally immaterial, or in the exercise of the proper discretion as to the order of proof, but enough remain, and may be grouped together, to raise the serious question argued at the bar.

The plaintiff offered to show the agreement of March, 1877, between himself and the railroad company, for the restoration of the depot to its original site within a reasonable time, and the breach of that agreement by the defendant company. The objection, put upon the ground that the offered proof was irrelevant and incompetent, was sustained and the evidence excluded. The plaintiff then sought to show how long a time elapsed, after the execution of the contract, before the depot was re-established at the foot of Main street; whether an interval did occur, and how much time elapsed from the date of the contract to the building of the new depot, which evidence was also excluded as immaterial. A series of questions were further put, to show what the defendant did, if anything, in and about procuring plaintiff's mortgaged property to be sold and sacrificed under the mortgage; when the foreclosure took place; at whose instigation; and at what price, compared with its real value, the property was sold. These questions were excluded. The plaintiff also attempted to show that the re-establishment of the depot at the foot of Main street would have largely increased the value of his adjoining property covered by the mortgage. That evidence was rejected. The plaintiff was then asked if he had an interview with the officers of the defendant in reference to the removal and

the re-establishment of the depot. This question was objected to, and the only ground assigned was, "as it is in writing." No proof of that was given; the case shows nothing but the assertion of the party objecting, and thereupon the witness was not permitted to answer the inquiry, whether he had an interview at all. He was then asked what reasons they assigned for removing the depot and refusing to bring it back, and this was excluded. And in the end the plaintiff was nonsuited because he had given no proof of a tort or a fraud. He now insists that he was first debarred from giving such proof, and then nonsuited because he had not given it.

The exclusion of proof of the contract for re-establishing the depot, and the willful and intended breach of that contract, brings up for our consideration the question principally argued. Such exclusion must rest for its justification upon the theory of the defendant's counsel, already adverted to, which we are troubled to reconcile with his concession that a cause of action was alleged in the complaint. At the foundation of every tort must lie some violation of a legal duty, and, therefore, some unlawful act or omission. (Cooley on Torts, 60.) Whatever, or however numerous or formidable, may be the allegations of conspiracy, of malice, of oppression, of vindictive purpose, they are of no avail; they merely heap up epithets, unless the purpose intended, or the means by which it was to be accomplished, are shown to be unlawful. (O'Callaghan v. Cronan, 121 Mass. 114; Mahan v. Brown, 13 Wend. 261.) The one separate and distinct unlawful act or omission alleged in this complaint, or rather the only one so separable which we can see may have been unlawful, was the unreasonable delay in restoring the depot to its original location; and that was unlawful, not inherently or in itself, but solely by force of the contract with plaintiff. The instigation of the sale on foreclosure, as a separate fact, may have been unkind or even malicious, but cannot be said to have been unlawful. The mortgagee had a perfect right to sell, judicially established, and what it might lawfully do, it was not unlawful to ask it to do. The act of instigating the sale may be material and have force, as one link in a chain of events, and as serving to explain and characterize an unlawful purpose, pursued by unlawful means; but, in itself, it was not an unlawful act, and cannot serve as the foundation of a tort. (Randall v. Hazleton, 12 Allen, 412.) We are forced back, therefore, to the contract for re-establishing the depot and its breach as the basis or foundation of the tort pleaded.

If that will not serve the purpose in some manner, by some connection with other acts and conditions, then there was no cause of action for a tort stated in the complaint. We are thus obliged to study the doctrine advanced by the respondent, and measure its range and extent. It rests upon the idea that unless the contract creates a relation, out of which relation springs a duty, independent of the mere contract obligation, though there may be a breach of the contract, there is no tort, since there is no duty to be violated. And the illustration given is the common case of a contract of affreightment, where, beyond the contract obligation to transport and deliver safely, there is a duty, born of the relation established to do the same thing. In such a case, and in the kindred cases of principal and agent, of lawyer and client, of consignor and factor, the contract establishes a legal relation of trust and confidence; so that upon a breach of the contract there is not merely a broken promise, but, outside of and beyond that, there is trust betrayed and confidence abused; there is constructive fraud, or a negligence that operates as such, and it is that fraud and that negligence which, at bottom, makes the breach of contract, actionable as a tort. (Coggs v. Bernard, 2 Lord Raym. 909; Orange Bank v. Brown, 3 Wend. 161, 162.)

So far we see no reason to disagree with the learned counsel for the respondent save in one respect, but that is a very important one. Ending the argument at this point leaves the problem of the case still unsolved. If a cause of action for a tort, as is admitted, was stated in the complaint, it helps us but little to learn what it was not, and that it does not fall within a certain class of exceptional cases, and cannot be explained by them. We have yet to understand what it is, if it exists at all, as a necessary preliminary to any just appreciation of the relevancy or materiality of the rejected evidence. The General Term, as we have remarked, described the tort pleaded as a "clear case of fraud." If that be true, it cannot depend upon a fiduciary or other character of the relation constituted by the contract merely, for no such relation existed; and there must be some other relation not created by the contract alone, from which sprang the duty which was violated. Let us analyze the tort alleged somewhat more closely.

At the date of the contract, the complaint shows the relative situation and needs of the two parties. The railroad company desired to close the draw over the Nepperhan river, and substitute a solid bridge. With the growth of its business, and the multitude

of its trains, the draw had become a very great evil, and a serious danger. The effort to dispense with it was in itself natural and entirely proper. On the other hand, the plaintiff was both a riparian owner above the draw, and likely to be injured in that ownership by a permanent bridge, and had suffered, and was still suffering, from a severe depreciation in the value of his property near Main street by the previous removal of the railroad station. The defendant was so far master of the situation, that it could and did shut up the plaintiff to a choice of evils. He might insist upon the draw, and leave his mortgaged property to be lost from depreciation, and save his riparian rights, or he might surrender the latter to save the former. This last was the alternative which he selected, and the contract of 1877 was the result. In the making of this contract there was no deceit or fraud, and no legal or actionable wrong on the part of the defendant.

If it drove a hard bargain, and had the advantage in the negotiation, it at least invaded no legal right of the plaintiff, and he was free to contract or not as he pleased. The complaint does not allege that at the execution of this agreement there was any purpose or intention of not fulfilling its terms. The tort, if any, originated later. What remains then is this: The railroad company conceived the idea of closing Main street to any travel where it passed their tracks at grade; of substituting a bridge crossing in its stead; and of fencing in its track along the street beneath, so as to compel access to the cars through its depot in such manner that the purchase of tickets could be compelled. This in itself was a perfectly lawful purpose. The grade crossing was a deathtrap, and the interest of the company and the safety of individuals alike made a change desirable, and the closing in of the depot was in no sense reprehensible. But there was a difficulty in the way. The plaintiff again stood as an obstacle in the path. The closing of Main street, though beneficial to the company, was to him and his adjoining property claimed to be a very serious injury. He declined to consent, except upon the condition of an award of heavy damages, and in dread of that peril the common council refused to pass the necessary ordinance. At this point, according to the allegations of the complaint, if at all, or ever, arose the tort. It is alleged that the defendant, in order to reach a lawful result, planned a fraudulent scheme for its accomplishment by unlawful means, and through an injury to the plaintiff, which would strip him of his damages

by a complete sacrifice of his property. This plan was executed in this manner. The company willfully and purposely refused to perform its contract. It had built its permanent bridge over the Nepperhan, and so received the full consideration of its promise; its new depot was substantially finished and ready for occupation; and no just reason remained why its contract should not be fulfilled. But the company refused. It did not merely neglect or delay; it openly and publicly refused. The purpose of that public refusal was apparent. It was to drive the plaintiff's mortgagee to a foreclosure; it was to shut out from plaintiff that appreciation of his property which would enable him to save it; it was to strip him of it, so as to extinguish the threatened damages, and thus procure the assent of the common council, and get Main street closed. This unlawful refusal to perform the contract, this deliberate announcement of the purpose not to restore the depot, was well calculated to influence the mortgagee toward a foreclosure. But the defendant's direct instigation was added. The foreclosure came; the mortgagee bid in the property at a sacrifice; swiftly followed a release of damages, an ordinance of the common council, the closing of Main street, and then the restoration of the depot.

We are thus able to see what the tort pleaded was. It was not a constructive fraud, drawn from the violation of a duty imposed by law out of some specific relation of trust and confidence, but an actual and affirmative fraud; an alleged scheme to accomplish a lawful purpose by unlawful means. There was here, on the theory of the complaint, something more than a mere breach of contract. That breach was not the tort; it was only one of the elements which constituted it. Beyond that and outside of that there was said to have existed a fraudulent scheme and device by means of that breach to procure the foreclosure of the mortgage at a particular time and under such circumstances as would make that foreclosure ruinous to the plaintiff's rights, and remove him as an obstacle by causing him to lose his property, and thereby his means of resistance to the purpose ultimately sought. In other words, the necessary theory of the complaint is that a breach of contract may be so intended and planned; so purposely fitted to time, and circumstances and conditions; so inwoven into a scheme of oppression and fraud; so made to set in motion innocent causes which otherwise would not operate, as to cease to be a mere breach of contract, and become, in its association with the attendant circumstances, a tortious and wrongful act or omission.

It may be granted that an omission to perform a contract obligation is never a tort, unless that omission is also an omission of a legal duty. But such legal duty may arise, not merely out of certain relations of trust and confidence, inherent in the nature of the contract itself, as in the cases referred to in the respondent's argument, but may spring from extraneous circumstances, not constituting elements of the contract as such although connected with and dependent upon it, and born of that wider range of legal duty which is due from every man to his fellow, to respect his rights of property and person, and refrain from invading them by force or fraud. It has been well said that the liability to make reparation for an injury rests not upon the consideration of any reciprocal obligation, but upon an original moral duty enjoined upon every person so to conduct himself, or exercise his own rights as not to injure another. (Kerwhacker v. C. C. & C. R. R. Co., 3 Ohio St. 188.) Whatever its origin, such legal duty is uniformly recognized, and has been constantly applied as the foundation of actions for wrongs; and it rests upon and grows out of the relations which men bear to each other in the framework of organized society. It is then doubtless true, that a mere contract obligation may establish no relation out of which a separate or specific legal duty arises, and yet extraneous circumstances and conditions, in connection with it, may establish such a relation as to make its performance a legal duty, and its omission a wrong to be redressed. The duty and the tort grow out of the entire range of facts of which the breach of the contract was but one. The whole doctrine is accurately and concisely stated in 1 Chit. Pl. 135, that "if a common-law duty result from the facts, the party may be sued in tort for any negligence or misfeasance in the execution of the contract." It is no difficulty that the mortgagee's agreement to give time, and postpone the sale for plaintiff's benefit was invalid, and a mere act of grace which could not have been compelled. If it is made plain that the mortgagee would have waited but for the fraudulent scheme and conduct of the defendant, that is enough. (Benton v. Pratt, 2 Wend. 385; Rice v. Manley, 66 N. Y. 83.) Nor is it a difficulty that the injury suffered was the result of a series of acts some of which were lawful and innocent. (Cooley on Torts, 70; Bebinger v. Sweet, 1 Abb. N. C. 263.)

Assuming now that we correctly understand what the tort pleaded was, and which was conceded to constitute a cause of action, it

seems to us quite clear that the plaintiff was improperly barred from proving it. From the very nature of the case a fraud can seldom be proved directly, and almost uniformly is an inference from the character of the whole transaction, and the surrounding and attendant circumstances. Proof of the contract and its breach, of the delay in restoring the depot and the reasons therefor, were essential links in the chain. If the proof should go no further, a nonsuit would be proper, but without these elements the tort alleged could not be established at all. And so the situation of the parties as it respected their several properties, the existence of the mortgage, the agreement to postpone the sale, were elements of the transaction proper to be shown. The plaintiff's interview with the officers of the defendant company, and their statement of the reasons for refusing to restore the depot were improperly excluded. While we cannot know what it was which actually occurred, it is very plain that their statement of reasons would bear materially upon the issues involved.

We are not concerned with the question of the wisdom of the plaintiff's choice of his form of action, or of what may result if the cause of action pleaded as a tort shall be hereafter assailed instead of its sufficiency being conceded. It may well be that he has chosen the one most difficult to maintain, and that an action upon one or more of the contracts would be less surrounded by difficulties. But we have nothing to do with his choice. He is entitled to prove his cause of action if he can.

The judgment should be reversed, and a new trial granted, costs to abide the event.

All concur, except RAPALLO and MILLER, JJ., not voting.
Judgment reversed.

UNITED RAILWAYS & ELECTRIC CO. OF BALTIMORE v. STATE, to Use of DEANE et al.

(93 Md. 619; 49 At. 923; 86 Am. S. R. 453.—1901.)

MCSHERRY, C. J. This suit was brought in the name of the state of Maryland, to the use of the widow and children of Frank H. Deane, against the United Railways & Electric Company of Baltimore, to recover damages for the injury caused to the equi-

table plaintiffs by the death of Mr. Deane. His death is alleged to have been the result of the defendant's negligence, and the negligence charged consisted in the failure of the company's servants to protect the deceased, while he was a passenger on one of its cars, from the deadly assault made upon him by a fellow passenger. The main question in the case is whether there was sufficient evidence of negligence to justify the trial court in allowing the case to go to the jury. * * * *

It may not be amiss at this point to state briefly the legal principles applicable to such a case as this, though they were considered and announced not long ago in Tall v. Packet Co., 90 Md. 248, 44 Atl. 1007: "A carrier is not an insurer of the absolute safety of his passengers, yet he is bound to use reasonable care according to the nature of his contract; and, as his employment involves the safety of the lives and limbs of his passengers, the law requires the highest degree of care which is consistent with the nature of his undertaking. Baltimore & O. R. Co. v. State, 60 Md. 449. This, though the measure of the carrier's duty as between him and his passenger in respect to the acts or omissions of the carrier and his servants towards the passenger, is not the standard by which his liability to the passenger is to be gauged or determined when intervening acts of fellow passengers or strangers directly cause the injury sustained while the relation of passenger and carrier is subsisting. * * * The negligence for which, in such cases, the carrier is responsible, is not the tort of the fellow passenger or the stranger, but it is the negligent omission of the carrier's servants to prevent that tort from being committed. The failure or omission to prevent the commission of the tort, to be a negligent failure or omission, must be a failure or an omission to do something which could have been done by the servant; and therefore there is involved the essential ingredient that the servant had knowledge, or with proper care could have had knowledge, that the tort was imminent, and that he had that knowledge, or had the opportunity to acquire it, sufficiently long in advance of its infliction to have prevented it with the force at his command. * * *

According to the testimony of the plaintiff's witnesses, while the car was proceeding from Camden street towards Pratt street, Geisenkotter, without the slightest provocation, assaulted Mr. Deane, striking him a vicious blow in the eye, which caused the rupture of a cerebral blood vessel, and thereby produced paralysis, and ulti-

mately death. On the part of the defendant it was shown that an effort was made to eject Geisenkotter at Pratt street; that at each intersecting street a search was made for a police officer, but none was found; and that after the car passed Baltimore street, and before it reached Fayette street, the fatal blow was struck. The company insists that it was not derelict in its duty to the passenger, because its agents did not know, and had no reason to apprehend, that Deane was in imminent danger of injury at the hands of his drunken and disorderly fellow passenger; and the question was asked during the argument, what did the employés fail to do that they ought to have done, and which, if they had done, would have prevented the injury? It may be true that there was no reason to suppose that Mr. Deane, rather than any other passenger, was in imminent peril. But that is not material. As already observed, it is not the peril which a particular individual is in that is to be considered in a case of this kind. If there is danger of any one being injured, and the employés fail to remove, subdue, or overpower the turbulent individual, after knowing that there is danger, or after they ought to have known that there was danger if they had exercised proper care, that failure is negligence, for the consequences of which the company is answerable. So the case comes down to the inquiry, was there evidence tending to show that the employés of the defendant failed to do what they ought to have done under the circumstances? There ought to be no difficulty in answering this question. If Geisenkotter, who had assaulted another passenger before he was ejected from the car, and who was drunk, disorderly, and turbulent, was properly put off the car because his presence was a menace to other passengers, then it was the plain duty of the employés who put him off, to have kept him off. They demonstrated their ability to keep him off by having put him off. If he had been kept off after having been put off, he could not have assaulted Deane. While his assault on the other passenger did not necessarily indicate that he would subsequently strike Mr. Deane, it did show that he was in a condition which rendered it very probable and likely that he would attack some one else; and this was known to the employés sufficiently long before the assault was made on Mr. Deane to enable the conductor not only to put Geisenkotter off, but to have kept him off, the car. It cannot be doubted that if there was sufficient reason for putting Geisenkotter off the car, so that injury to other passengers might be avoided, there was equally sufficient reason for keeping him off; and

the failure to do this when there was power to do it was an act of negligence which caused the injury to and death of Mr. Deane. If, on the other hand, every effort was made by the employés to avert the injury, but was made without success, then the company would not be liable. This was plainly said to the jury, and it was a question of fact which was properly left to them. * * *

Judgment for plaintiff below, affirmed.

ST. LOUIS, I. M. & S. RY. v. WILSON.

(70 Ark. 136; 66 S. W. 661.—1902.)

Dilsia Wilson, a colored girl under 18 years of age, by her next friend, charged in her complaint that on the 29th day of December, 1898, about 9 o'clock a. m., she went to the depot at Benton, Ark., for the purpose of taking the train to Traskwood; that the weather was cold and disagreeable; that she went into the colored waiting room, and was compelled to remain in the cold, without any fire, for about one hour, until the train arrived, in consequence whereof she was caused to have a chill, and was very sick during the remainder of that day, and during two weeks thereafter. * * * From a judgment for the complainant the railroad company appealed.

WOOD, J. We will consider the questions in the order presented by appellant's counsel. * * * *

2. Appellant objects to the following instruction: "If plaintiff went to defendant's depot on the day mentioned in the complaint, to take passage on defendant's train, and at that time the weather was such as to require a fire in the waiting room to make it comfortable, it was defendant's duty to build and keep a fire in said waiting room; and, if it failed to do so, and plaintiff suffered in consequence of defendant's failure to build and keep such fire, your verdict will be for the plaintiff." It was the duty of railroads, independent of the statute of March 31, 1899, to provide reasonable accommodations for passengers at their stations. McDonald v. Railroad Co., 26 Iowa, 138, 95 Am. Dec. 114. This duty requires the exercise of ordinary care to see that station houses are provided with reasonable appointments for the safety and essential comfort of passengers, or those intending to become passengers, while they are waiting for

trains. Caterham R. Co. v. London, B. & S. C. Ry. Co., 87 E. C. L. 410; 1 Fet. Carr. §§ 249, 250; Railway Co. v. Cornelius (Tex. Civ. App.) 30 S. W. 720; Hutch. Carr. §§ 516–521, inclusive; 2 Wood, Ry. Law, § 1338; Elliott, R. R. § 1590.

By the exercise of such care as ordinary prudence would suggest for reasonable comfort, it could hardly occur that a waiting room, in midwinter, would be devoid of the means necessary to make it comfortably warm at the times when such rooms are needed to accommodate those intending to become passengers. A failure to provide such means is, therefore, at least prima facie evidence of negligence. It is insisted that the instruction "eliminated all question of diligence and negligence," and made the company an "insurer against the consequences of not having a fire in the waiting room." But the company maintains that it was not negligent, because it built the fire in the waiting room as requested. It is not complaining of any latent defect or unforeseen exigency which ordinary care could not have anticipated and prevented. It could not have been prejudiced, therefore, by the instruction in the form given. Moreover, it did not request the court to declare the law to meet the objection it urges here to the instruction. Giving it as requested was not reversible error. Railway Co. v. Barnett, 65 Ark. 255, 45 S. W. 550. * * * *

The judgment was reversed for errors in other instructions.

JONES v. CRAWFORD.

(107 Ga. 825; 33 S. E. 51.—1899.)

Mrs. Crawford sued Jones for damages; alleging in substance that Jones induced her to sign as surety a note made by her son to Jones' order, by promising her "that he would never trouble her with the note, and that she should never have to pay it," that before the note was due, Jones transferred it to a *bona fide* holder, who enforced it against her and that Jones procured petitioner's signature to the note "by material misrepresentations, as hereinbefore set forth, and did so for the purpose and with the intention, at the time he procured the note, of indorsing and transferring the same before maturity to an innocent purchaser thereof, for the sole

purpose of depriving petitioner of her just defense to said note, which Jones well knew she could and would set up and prove against him, should he bring suit on said note against her." Damages were laid in the sum of $400, which sum is made up of the amount paid on the execution, and the various items of expense petitioner had incurred by reason of the suit against her on the note and of the present action.

The court overruled a general demurrer to the plaintiff's petition, and the defendant excepted.

COBB, J. The exact question now before us is presented for the first time in this state, and, after a thorough investigation of the authorities, we have been unable to find any case exactly identical with the one now under consideration. When Mrs. Crawford signed the note that had been previously signed by her son, she was interested in no way whatever in the consideration; and hence her signature imposed upon her no liability, under the law, to any one who had notice of the fact that her contract, though apparently that of a principal, was really one of suretyship only. Jones being cognizant of these facts, the paper was in his hands, so far as Mrs. Crawford was concerned, absolutely worthless. Civ. Code, § 2488. If Mrs. Crawford had paid to Jones the full amount of this note, she would have had the right to recover the same from him. Mills v. Hudgins, 97 Ga. 417, 24 S. E. 146; Lewis v. Howell, 98 Ga. 428, 25 S. E. 504. As she appeared upon the face of the note to be a principal, and as she had a right, under the law, to bind her separate estate by a contract of this character, a purchaser of the note for value before maturity, and without notice of the fact that the contract was really one of suretyship, would have a right to enforce payment of the same. Perkins v. Rowland, 69 Ga. 661; Strauss v. Friend, 73 Ga. 782. Association v. Perry, 103 Ga. 800, 30 S. E. 658, and cases cited. The married woman would thus be compelled to pay the innocent holder of the note, but in so doing she would be discharging the obligation for the benefit of the payee who had transferred the same.

If, therefore, a married woman could recover from the payee of the note, who had notice of the invalidity of her contract, an amount paid to him in satisfaction of the same, why should she not be allowed to recover from him the amount he has wrongfully compelled her to pay out for his benefit to another person? If Mrs.

Crawford had, at the special instance and request of Jones, voluntarily paid a sum equal to the amount due on the note to a creditor of Jones, who had no notice of the invalidity of her contract, and Jones had then surrendered her note, under the principle of the cases above cited there would be no legal obstacle to her bringing suit against Jones for the amount paid out for his benefit. If this is true, does it not necessarily follow that, where she has been compelled to pay to a creditor of Jones, she would have a right to recover the amount thus extorted from her? Certainly would this be true when at the time the note was signed by her she attempted to sign in such a way that no liability would arise against her on the note in the hands of any one, but was prevented from doing so by the fraudulent statements made to her by Jones that he did not intend to use the note in any way whereby she would be held liable thereon, which was, in effect, an agreement that the note would never be negotiated.

The subsequent negotiation of the note to an innocent purchaser, who, on account of the insolvency of the principal, compelled Mrs. Crawford to pay the amount due thereon, made complete a cause of action in her behalf against the payee, who had thus caused damage to her. The fraud in procuring and negotiating the note, followed by damage to the plaintiff on account of having to pay the same, made a cause of action against the defendant. Civ. Code, § 3813.

Judgment affirmed. All of the justices concurring.[1]

[1] In Met. El. Ry. v. Kneeland, 120 N. Y. 134, 24 N. E. 381 (1890), it appeared that Kneeland was president of the plaintiff company; but no salary was attached to this office, and the plaintiff had never agreed to pay him any salary. The other defendants were directors in the plaintiff company, and without authority passed a resolution authorizing the president to use the credit of the company by issuing and negotiating its notes to pay a salary of $25,000 which the directors had voted in his favor. The notes were issued, and some of them came into the hands of bona fide purchasers for value before maturity, and without notice of the purpose for which they were issued, or of the want of authority of the directors to pass the resolution above referred to. The suit was brought to compel the defendants to pay the plaintiff the amount of the notes issued by them, or of such part of them as would be liable to pay. It was held that the action could be maintained; Vann, J., saying in the opinion: "These notes, as is here admitted, the plaintiff has become liable to pay in consequence of the fraudulent conduct of those defendants. Thus, the dead pieces of paper were, to this extent, given life, and converted into contracts binding upon the company without its consent * * * We think that the cases relating to this subject rest upon the principle that a person who fraudulently places in circulation the negotiable instrument

CHAPTER II.

NATURE OF A TORT.

§ 1.—DISTINGUISHED FROM A CRIME.

BOSTON & W. RY. CORP. v. DANA.

(1 Gray (Mass.), 83.—1854.)

BIGELOW, J. The main objection, raised by the defendant in the present case, which, if well maintained, is fatal to the plaintiff's action, presents an interesting and important question, hitherto undetermined by any authoritative judgment in the courts of this Commonwealth.

of another, whether made by him or by his apparent authority, and thereby renders him liable to pay the same to a bona fide purchaser is guilty of a tort, and in the absence of special circumstances diminishing its value, is presumptively liable to the injured party for the face value thereof." To the same effect, is Nashville Lumber Co. v. Fourth Nat. Bank, 94 Tenn. 374, 29 S. W. 368 (1895.)

In Emmons v. Alvord, 177 Mass. 460, 59 N. E. 126 (1901), Holmes, C. J. said: "For a broker employed to sell land to understate to his principal an offer which he has received, with intent to appropriate, or to help some one else to appropriate, the difference between the amount as he states it and the amount actually offered, is an actionable wrong, if the fraud succeeds, for which substantial damages can be recovered in case they can be proved. The action is not brought to follow a fund to which the plaintiff has a claim into the defendant's hands, but is brought without regard to where the fund may be, for the agent's fraudulent act. It is true that, but for the contract of agency, the concealment and misrepresentation might not be a tort. But there are other cases in which a tort is said to spring out of a contract. In the old law a breach of warranty was a deceit, although innocent. Norton v. Doherty, 3 Gray, 372, 373. A carrier is liable in tort by reason of the bailment and his calling. Hutch. Carr. (2d Ed.) §§ 738–740. Whether an act is tortious or not always depends upon the circumstances, of course, and it hardly needs remark that the circumstance of confidential relations should give wrongful character to an act that in a different situation—for instance, that of buyer—would be untouched by the law. See City of Boston v. Simmons, 150 Mass. 461, 23 N. E. 210; Russel v. Palmer, 2 Wils; 325; Marzetti v. Williams, 1 Barn. & Adol. 415, 424; Bank v. Simons, 133 Mass. 315 (tort or contract)."

The plaintiffs seek to recover in an action of assumpsit a large sum of money alleged by them to have been fraudulently abstracted from their ticket office by the defendant, while he was in their employment as depot-master, having charge of their principal railway station in Boston. In regard to this item of the plaintiff's claim, the defendant contended at the trial, and requested the judge who presided to instruct the jury, that the plaintiffs were not entitled to recover in this action the money thus taken by the defendant, because their cause of action, if any they had, was suspended until an indictment had been found or complaint made against the defendant for larceny.

This request was refused, and the jury were instructed, that if the defendant had fraudulently taken and appropriated the plaintiff's money in the manner alleged, and was thereby guilty of larceny, he would be liable in the present action, although no criminal prosecution had first been instituted therefor. It is upon the correctness of this instruction that the first and main question in the case arises.

The doctrine that all civil remedies in favor of a party injured by a felony are, as it is said in the early authorities, merged in the higher offense against society and public justice, or, according to more recent cases, suspended until after the termination of a criminal prosecution against the offender, is the well-settled rule of law in England at this day, and seems to have had its origin there at a period long anterior to the settlement of this country by our English ancestors. (Markham v. Cobb, Latch, 144, and Noy, 82; Dawkes v. Coveneigh, Style 346; Cooper v. Witham, I Sid. 375, and 1 Lev. 247; Crosby v. Leng, 12 East, 413; White v. Spettigue, 13 M. & W. 603; 1 Chit. Crim. Law, 5.)

But although thus recognized and established as a rule of law in the parent country, it does not appear to have been, in the language of our constitution, "adopted, used and approved in the province, colony or State of Massachusetts Bay, and usually practiced on in the courts of law." The only recorded trace of its recognition in this Commonwealth is found in a note to the case of Higgins v. Butcher, Yelv. (Amer. ed.) 90 a, note 2, by which it appears to have been adopted in a case at *nisi prius* by the late Chief Justice Sewall. The opinion of that learned judge, thus expressed, would certainly be entitled to very great weight, if it were not for the opinion of this court in Boardman v. Gore, 15 Mass. 338, in which it is

strongly intimated, though not distinctly decided, that the rule had never been recognized in this State, and had no solid foundation, under our laws, in wisdom or sound policy. Under these circumstances, we feel at liberty to regard its adoption or rejection as an open question, to be determined, not so much by authority, as by a consideration of the origin of the rule, the reasons on which it is founded and its adaptation to our system of jurisprudence.

The source, whence the doctrine took its rise in England, is well known. By the ancient common law, felony was punished by the death of the criminal and the forfeiture of all his lands and goods to the crown. Inasmuch as an action at law against a person, whose body could not be taken in execution and whose property and effects belonged to the king, would be a useless and fruitless remedy, it was held to be merged in the public offense. Besides, no such remedy in favor of the citizen could be allowed without a direct interference with the royal prerogative. Therefore a party injured by a felony could originally obtain no recompense out of the estate of a felon, nor even the restitution of his own property, except after a conviction of the offender, by a proceeding called an appeal of felony, which was long disused, and wholly abolished by St. 59, Geo. 3, c. 46; or under St. 21, H. 8, c. 11, by which the judges were empowered to grant writs of restitution, if the felon was convicted on the evidence of the party injured or of others by his procurement. (2 Car. & P. 43, n.) But these incidents of felony, if they ever existed in this State, were discontinued at a very early period in our colonial history. Forfeiture of lands or goods, on conviction of crime, was rarely, if ever, exacted here; and in many cases, deemed in England to be felonies and punishable with death, a much milder penalty was inflicted by our laws. Consequently the remedies, to which a party injured was entitled in cases of felony, were never introduced into our jurisprudence. No one has ever heard of an appeal of felony, or a writ of restitution under St. 21, H. 8, c. 11, in our courts. So far, therefore, as we know the origin of the rule and the reasons on which it was founded, it would seem very clear that it was never adopted here as part of our common law.

Without regard, however, to the causes which originated the doctrine, it has been urged with great force and by high authority, that the rule now rests on public policy (12 East, 413, 414); that the interests of society require, in order to secure the effectual prosecutions of offenders by persons injured, that they should not be

permitted to redress their private wrongs, until public justice has been first satisfied by the conviction of felons; that in this way a strong incentive is furnished to the individual to discharge a public duty, by bringing his private interest in aid of its performance, which would be wholly lost, if he were allowed to pursue his remedy before the prosecution and termination of a criminal proceeding. This argument is doubtless entitled to a great weight in England, where the mode of prosecuting criminal offenses is very different from that adopted with us. It is there the especial duty of every one, against whose person or property a crime has been committed, to trace out the offender, and prosecute him to conviction. In the discharge of this duty, he is often compelled to employ counsel; procure an indictment to be drawn and laid before the grand jury, with the evidence. * * * There being no such necessity calling for the adoption of the rule, we are of opinion that it ought not to be engrafted into our jurisprudence.

We are strengthened in this conclusion by the weight of American authority, and by the fact that in some of the States, where the rule had been established by decisions of the courts, it has been abrogated by legislative enactments. (Pettingill v. Rideout, 6 N. H. 454; Cross v. Guthery, 2 Root, 90; Piscataqua Bank v. Turnley, 1 Miles, 312; Foster v. Commonwealth, 8 W. & S. 77; Patton v. Freeman, Coxe, 113; Hepburn's Case, 3 Bland, 114; Allison v. Farmer's Bank of Virginia, 6 Rand. 223; White v. Fort, 3 Hawkes, 251; Robinson v. Culp, 1 Const. Rep. 231; Story v. Hammond, 4 Ohio, 376; Ballew v. Alexander, 6 Humph. 433; Blassingame v. Glaves. 6 B. Monr. 38. Rev. Sts. of N. Y. Part 3, c. 4, § 2; St. of Maine of 1844, c. 102.)

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§ 2.—DISTINGUISHED FROM A CONTRACT.

KNOWLES v. KNOWLES.

(25 R. I.——, 56 At. 775.—1903.)

STINESS, C. J. The plaintiffs sued in trespass on the case to recover damages for the wrongful act of the defendant in recording a deed, which, by reason of a concurrent defeasance, was in fact a mortgage of land in Swan Point Cemetery, held for burial purposes. The substantial facts are these: John C. Knowles, Sr., husband and father of the respective plaintiffs, who were also his devisees, made a

deed of an unoccupied part of his burial lot in the cemetery to Edwin Knowles, Sr., as security for Edwin's indorsement of his note for $1,600, and took back from said Edwin a written agreement, saying: "Now, therefore, if said note is paid, or any renewals of the same, saving me harmless from all costs or damage by reason of said indorsement, then I agree to retransfer said land, as aforesaid, on demand." The note was subsequently merged with other indebtedness, but it was not surrendered by Edwin Knowles, Sr., probably for the reason that he retained it as security under the deed in question. After the death of John C. Knowles, Sr., Mrs. Knowles paid all the indebtedness due to Edwin Knowles, Sr., and requested him to return to her the deed of the burial lot, which was a part of the security for the indebtedness. Mr. Knowles replied that he could not find it, and it would make no difference, as it had never been recorded, so that the title would stand in the plaintiffs as effectually as if he had delivered it back.

Thus matters stood from May, 1896, to March, 1900, when Edwin Knowles, Sr., died, and the defendant, Edwin Knowles, Jr., became his administrator. The defendant found the deed, note, and a copy of the defeasance among his father's papers, but said nothing to Mrs. Knowles about them until in April, 1902, when she told him that she was to give a part of the lot in exchange for perpetual care of the rest. He then said that his father had a deed of the lot. Mrs. Knowles told him she had paid all the indebtedness, and he then had the deed recorded in the records of the cemetery. After the record of the deed Mrs. Knowles and her son were not recognized by the officers of the cemetery as the owners of the land, and she was thereby put to trouble and annoyance, for which this suit is brought to recover damages.

The declaration is in two counts, a third being substituted for the first. The first count is based upon the wrongful act of the defendant in recording the deed, and the second is for the conversion of the deed. The jury found for the plaintiffs, and awarded the sum of $2,600, although the value of the land was shown to be only $1,500. The defendant petitions for a new trial. * * * *

The only ground on which the recording of the deed could be claimed to amount to a wrongful act or a conversion of the deed is the plaintiff's claim that title being revested by the fact of payment became divested by the act of recording. This, as we have seen, is not so. The plaintiffs were and are still entitled to a reconveyance.

They claim that they have been put out of possession of the land, but this does not appear. A body was buried in the lot by some one, but it has been removed, and there is no evidence of other disturbance of possession. The mere fact that the officers at present recognize the heirs of Edwin Knowles as the owners of the land is the natural consequence of the state of the title as made by the giving of the deed. The only ground upon which the plaintiffs could possibly recover would be upon a refusal to retransfer after demand, but this remedy would be in an action on the covenant, and not in tort. The testimony shows such a demand and refusal as to this defendant, but he is only one of the heirs of Edwin Knowles, and it does not appear that any demand was made upon the other heir. Moreover, there is no such ground of recovery stated in the declaration. It sets out that it "became the duty of the defendant to deliver said mortgage to the plaintiffs, and to do or cause to be done, so far as he was able, all things necessary to give to the plaintiffs, or to permit them to retain, the seisin and possession of said part of said burial lot." This does not amount to a demand and refusal to retransfer, and we find no other allegation of such a cause of action, if it could be alleged in this action.

The action, though an action on the case, is, as stated, an action of tort; while the plaintiffs' real cause of action is a breach of a covenant, not of a duty imposed by law. There is therefore nothing in the case to support the action. In this view it is unnecessary to consider the question of damages, or the exceptions as to admissibility of certain evidence.

The petition is granted, and the case remitted to the common pleas division, with direction to enter judgment of nonsuit.

BIGBY v. UNITED STATES.

(188 U. S. 400; 23 Sup. Ct. 468.—1902.)

MR. JUSTICE HARLAN delivered the opinion of the court:

Bigby, the plaintiff in error, claimed in his petition to have been damaged to the extent of $10,000 on account of certain personal injuries received by him while entering an elevator placed by the United States in its courthouse and postoffice building in the city

of Brooklyn, and asked judgment for that sum against the government.

The petition was demurred to upon three grounds, namely, that the court had no jurisdiction of the person of the defendant, or of the subject of the action, and did not state facts sufficient to constitute a cause of action against the United States.

The demurrer was sustained by the circuit court on each of the grounds specified, and, so far as it was sustained upon the ground that the petition did not state a cause of action, it was sustained because the action was not authorized by the act of Congress known as the Tucker act, approved March 3d, 1887, chap. 359, and entitled "An Act to Provide for the Bringing of Suits against the Government of the United States." 24 Stat. at L. 505 (U. S. Comp. Stat. 1901, p. 752). The action was accordingly dismissed. * * * *

This being an action against the United States, the authority of the circuit court to take cognizance of it depends upon the construction of the above act of March 3d, 1887. * * * *

It is clear that the act excludes from judicial cognizance any claim against the United States for damages in a case "sounding in tort." But the contention of the plaintiff is, in substance, that, although the facts constituting the negligence of which he complains made a case of tort, he may waive the tort; that his present claim is founded upon an implied contract with the government, whereby it agreed to carry him safely in its elevator, would operate the elevator with due care, and employ for the purposes of such carriage a competent and experienced person; and, consequently, that his suit is embraced by the words "upon any contract, express or implied, with the government of the United States." The contention of the United States is that no such implied contract with the government arose from the plaintiff's entering or attempting to enter and use the elevator in question, and that the claim is distinctly for damages in a case "sounding in tort," of which the act of Congress did not authorize the circuit court to take cognizance.

Can the plaintiff's cause of action be regarded as founded upon implied contract with the government, within the meaning of the act of 1887?

The precise question thus presented has not been determined by this court. But former decisions may be consulted in order to ascertain whether this suit is embraced by the words, in that act, "upon any contract, express or implied, with the government of the

United States." Do those words include an action against the United States to recover damages for personal injuries caused by the negligent management of an elevator erected and maintained by it in one of its courthouse and postoffice buildings? * * * *

[After discussing a number of cases, the learned judge continued:]

It thus appears that the court has steadily adhered to the general rule that, without its consent given in some act of Congress, the government is not liable to be sued for the torts, misconduct, misfeasances, or laches of its officers or employees. There is no reason to suppose that Congress has intended to change or modify that rule. On the contrary, such liability to suit is expressly excluded by the act of 1887.

Cases of this kind are to be distinguished from those in which private property was taken or used by the officers of the government with the consent of the owner or under circumstances showing that the title or right of the owner was recognized or admitted. As, in United States v. Russell, 13 Wall. 623, 626, 20 L. ed. 474, which was an action to recover for the use of certain steamers used in the business of the government pursuant to an understanding with the owner that he should be compensated; or, in United States v. Great Falls Mfg. Co. 112 U. S. 645, 28 L. ed. 846, 5 Sup. Ct. Rep. 306, in which it appeared that certain private property was appropriated by officers of the government for public use, pursuant to an act of Congress, the title of the owner being recognized or not disputed; or, in United States v. Palmer, 128 U. S. 262, 269, 32 L. ed. 442, 444, 9 Sup. Ct. Rep. 104, which was an action to recover for the use of a patent which the government was invited by the patentee to use. In all such cases the law implies a meeting of the minds of the parties, and an agreement to pay for that which was used for the government, no dispute existing as to the title to the property used. The important fact in each of those cases was that the officers who appropriated and used the property of others were authorized to do so, and hence the implied contract that the government would pay for such use.

But, as we have seen, the plaintiff contends that when he entered, or attempted to enter, the elevator, the government must be deemed to have contracted that its employé in charge of it would use due care so as not to needlessly injure him. In other words,—for it

comes to that,—by the mere construction and maintenance of such elevator the government, contrary to its established policy, impliedly agreed to be responsible for the torts of an employé having charge of the elevator, if, by his negligence, injury came to one using it. We find no authority for this position in any act of Congress, and nothing short of an act of Congress can make the United States responsible for a personal injury done to the citizen by one of its employés who, while discharging his duties, fails to exercise such care and diligence as a proper regard to the rights of others required. "Causing harm by negligence is a tort." One of the definitions of a tort is "an act or omission causing harm which the person so acting or omitting did not intend to cause, but might and should with due diligence have foreseen and prevented." Pollock, Torts, 1, 19.

The elevator in question was erected in order to facilitate the transaction of the public business, and also, it may be assumed, for the convenience and comfort of those who might choose to use it when going to a room in the courthouse and postoffice building occupied by public officers, and not pursuant to any agreement, express or implied, between the United States and the general public, or under any agreement between the United States and the individual person who might seek to use it. No one was compelled or required to use it, and no officer in charge of the building had any authority to say that a person using it could sue the government if he was injured by reason of the want of due care on the part of the employé operating it. No officer had authority to make an express contract to that effect, and no contract of that kind could be implied merely from the government's ownership of the elevator and from the negligence of its employé. The facts alleged show a case in which the plaintiff was injured by reason of the negligence of the manager of the elevator. It is therefore a case of pure tort on the part of such manager for which he could be sued. It is a case "sounding in tort," because it had its origin in and is founded on the wrongful and negligent act of the elevator manager. There is in it no element of contract as between the plaintiff and the government; for, as we have said, no one was authorized to put upon the government a liability for damages arising from the wrongful, tortious act of its employee. The plaintiff therefore cannot by the device of waiving the tort committed by the elevator operator make a case against the government of implied contract.

A party may in some cases waive a tort; that is, he may forbear to sue in tort, and sue in contract, where the matter out of which his claim arises has in it the elements both of contract and tort. But it has been well said that "a right of action in contract cannot be created by waiving a tort, and the duty to pay damages for a tort does not imply a promise to pay them upon which assumpsit can be maintained." Cooper v. Cooper, 147 Mass. 370, 373, 17 N. E. 892, 894. If the plaintiff could sue the elevator employé upon an implied contract that due care should be observed by him in managing the elevator, it does not follow that he could sue the government upon implied contract. For under existing legislation no relation of contract could arise between the government and those who choose to use its elevator. It is easy to perceive how disastrous to the operations of the government would be a rule under which it could be sued for torts committed by its agents and employés in the management of its property. It is for Congress to determine in all such cases what justice requires upon the part of the government. * * * *

ATLANTA NAT. BANK v. DAVIS.

(96 Ga. 734; 23 S. E. 190; 51 Am. St. R. 139.—1895.)

LUMPKIN, J. 1. The plaintiff's check came by due course of mail to the defendant bank, upon which it was drawn, and in which he had on deposit at the time sufficient funds with which to pay it. The check was returned unpaid. It seems clear from the evidence that this was done, not deliberately or maliciously, but in consequence of a mistake made by one of the employés of the bank. The paper was not protested or willfully dishonored. Still, so far as the plaintiff is concerned, we think what occurred amounted to a refusal to pay his check. The consequences to him, resulting from the inadvertence of the bank official, were exactly the same as if there had been an express refusal to pay. We do not think a bank should be allowed to send out a paper with a badge of dishonor upon it, and then protect itself by saying, in effect, this was caused simply by its own carelessness.

2. It was not denied that, if the conduct of the bank amounted to a refusal to pay, it was liable in damages to the plaintiff, but the

serious question was as to what should be the measure of such damages. There was no proof of any actual or special damage, and the defendant therefore insisted that at most the damages awarded should be only nominal. We have given the subject some investigation, and as a result we find ourselves unable to accept this as a correct proposition of law. The following authorities are pertinent, and throw much light upon the question: In 2 Add. Cont. § 820, the author, after stating the general rule that a banker is bound to honor the checks of his customers, if presented within banking hours, and provided he has in hand sufficient funds for the purpose, belonging to the customers, adds: "And if he refuses he is liable to an action by the customer for substantial damages, without proof of actual damages, for it is a discredit to the customer to have his check refused payment." Again, in 2 Morse, Banks, § 458, after a statement of the general rule relating to the bank's duty in the premises, we find the following: "This duty and this right are so far substantial that if the bank refuses, without sufficient justification, to pay the check of the customer, the customer has his action for damages against the bank. It has been said that if, in such action, the customer does not show that he has suffered a tangible or measurable loss or injury from the refusal, he shall recover only nominal damages. But the better authority seems to be that, even if such actual loss or injury is not shown, yet more than nominal damages shall be given. It can hardly be possible that a customer's check can be wrongfully refused payment without some impeachment of his credit, which must in fact be an actual injury, though he cannot, from the nature of the case, furnish independent, distinct proof thereof."

Accordingly it would seem that the plaintiff's recovery is not to be limited to merely nominal damages. We find authority for saying that in such a case he should be awarded "temperate" damages. Thus in Birchill v. Bank, 19 Cent. Law J. 390, it was ruled that a bank is liable in temperate damages to a customer for a wrongful dishonor of his check, without proof of special damages. In the notes appended to an article on "Damages for Wrongful Dishonor of Checks," following the report of the above-cited case, will be found a large collection of authorities, which may be of help to any one desiring to further pursue an investigation into this question. Another authority for the allowance of temperate damages to a customer for wrongful dishonor of his check, although special

damage is not shown, is Newm. Bank Dep. § 215; and the same rule is stated in 3 Am. & Eng. Enc. Law. p. 226, under the title "Checks." In a note to the text, Birchall's Case, supra, is cited.

3. In view of all the evidence disclosed by the record, we think the verdict for $200 rendered in the present case was temperate, and therefore sustainable.

Judgment affirmed.[1]

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§ 8.—EXTENDING THE AREA OF TORT.

SHEEHORN v. DARWIN.

(1 Treadway (S. C.), 196.—1812.)

This was a special action on the case. The declaration alleged, that the plaintiff had a judgment, and *capias ad satisfaciendum*, against James Darwin, Jun. Upon the *ca. sa.* he was in custody.

That James Darwin, Jun., contrary to the will of the sheriff escaped; and that James Darwin, Sen., knowing the premises, and to injure the plaintiff, and to prevent him from having satisfaction of his judgment, did during the escape and eloignment of James Darwin, Jun., harbor, comfort, hide and secrete him; and aided and assisted to keep him away from, and to elude the search of the sheriff; and that he furnished him with horses, money, clothing, etc., to go away where the sheriff could not find or track him, and

[1] In J. M. James Co. v. Continental Nat. Bank, 105 Tenn. 1, 58 S. W. 261, (1900), it is said: "We think there can be no doubt that the trial judge fell into serious error in treating these counts as counts in slander, and holding them barred by the statute of limitation of six months. He was equally guilty of error in sustaining the defendant's first ground of demurrer to the second count of the declaration. This count has already been set out. It is in tort. It was a count for a breach of duty growing out of the implied contract of the bank to honor plaintiff's checks as long as he had money to his credit. It was a count *ex delicto*. Junker v. Fobes (C. C.) 45 Fed. 840. It alleged that plaintiff was a trader, and as such engaged "in the mercantile or commission business in the city of Memphis," but, as may be seen, averred no special damage as the result of the defendant's wrongful conduct. The ground of demurrer referred to is that its failure to allege special damages was fatal. The authorities are uniform that the averment that plaintiff is a trader is sufficient, and he is entitled in such a case to recover substantial damages, though special damage is not alleged." See, Svendsen v. State Bank, 64 Minn. 40, 65 N. W. 1086, 58 Am. St. R. 523 (1896).

that during the said eloignment, the escape, to prevent the sheriff from taking the said James Darwin, Jun., he falsely affirmed, to the sheriff, that the said James Darwin, Jun., was not in the house of the said James Darwin, Sen., when in fact he was in the house; whereby the plaintiff lost his damages recovered, etc. Demurrer to the declaration and joinder. The court supported the demurrer.

The plaintiff moved the Constitutional Court at Columbia, to reverse the decision, and to overrule the demurrer, on the ground that the facts, set forth in the declaration, show a good and lawful cause for action.

CALCOCK, J. This action cannot be supported, either by precedent or principle. I have never read, or heard of such an action; though such occurrences must frequently take place, nor does it bear any analogy to cases quoted. There is no privity of contract between the parties, no consideration moving the defendant, no responsibility on him to the plaintiff; and no injury done to him, by the express showing of the plaintiff himself; for supposing that he lost his debt by the escape, he has a remedy against the sheriff, and therefore he at all events, has sustained no injury by the harboring, as it is styled. And further, it is not certain that he would have retaken him, had he been told he was in the house; nor if he had retaken him, is it certain that he would have obtained his money, for he might have taken the benefit of the Act. The court would not be induced to establish a new form of action, without manifest necessity, and none such appears in this case. I am therefore against the motion.

KUJEK v. GOLDMAN.

(150 N. Y. 178; 44 At. 778.—1896)

VANN, J. The verdict of the jury has established as the facts of this case, beyond our power to review, that the plaintiff married Katie Moritz in the belief that she was a virtuous girl, induced by the representations of the defendant to that effect, when in fact she was at the time pregnant by the defendant himself. The case was submitted to the jury upon the theory that if Goldman, knowing that Katie was unchaste, by false representations that she was virtu-

ous induced the plaintiff to marry her, he was entitled to recover damages, and the jury found a verdict in his favor for $2,000. While no precedent is cited for such an action, it does not follow that there is no remedy for the wrong, because every form of action, when brought for the first time, must have been without a precedent to support it. Courts sometimes of necessity abandon their search for precedents, and yet sustain a recovery upon legal principles clearly applicable to the new state of facts, although there was no direct precedent for it, because there had never been an occasion to make one.

In remote times, when actions were so carefully classified that a mistake in name was generally fatal to the case, a form of remedy was devised by the courts to cover new wrongs as they might occur, so as to prevent a failure of justice. This was called an "action on the case," which was employed where the right to sue resulted from the peculiar circumstances of the case, and for which the other forms of action gave no remedy. 26 Am. & Eng. Enc. Law. 694. For instance, the action for enticing away a man's wife, now well established, was at first earnestly resisted upon the ground that no such action had ever been brought. In an early case the court answered this position by saying: "The first general objection is that there is no precedent of any such action as this, and that, therefore, it will not lie; and the objection is founded on Litt. § 108, and Co. Litt. 81b, and several other books. But this general rule is not applicable to the present case. It would be if there had been no special action on the case before. A special action on the case was introduced for this reason: that the law will never suffer an injury and a damage without a remedy, but there must be new facts in every special action on the case." Winsmore v. Greenbank, Willes, 577, 580. As was recently said by this court in an action then without precedent, "If the most that can be said is that the case is novel, and is not brought plainly within the limits of some adjudged case, we think such facts not enough to call for a reversal of the judgment." Piper v. Hoard, 107 N. Y. 73, 76, 13 N. E. 626, 629. The question therefore is not whether there is any precedent for the action, but whether the defendant inflicted such a wrong upon the plaintiff as resulted in lawful damages. The defendant by deceit induced the plaintiff to enter into a marriage contract, whereby he assumed certain obligations, and became entitled to certain rights. Among the obligations assumed was the duty of supporting his

wife in sickness and in health, and he discharged this obligation by expending money to fit up rooms for housekeeping, in keeping house with his wife, and caring for her during confinement, when she bore a child, not to him, but to the defendant. Among the rights acquired was the right to his wife's services, companionship, and society. By the fraudulent conduct of the defendant, he was not only compelled to expend money to support a woman whom he would not otherwise have married, but was also deprived of her services while she was in childbed. He thus sustained actual damages to some extent; and as the wrong involved not only malice, but moral turpitude also, in accordance with the analogies of the law upon the subject the jury had the right to make the damages exemplary. By thus applying well-settled principles upon which somewhat similar actions are founded, this action can be sustained, because there was a wrongful act in the fraud, that was followed by lawful damages, in the loss of money and services. The fact that the corruption of the plaintiff's wife was before he married her does not affect the right of action, as the wrong done to him was not by her defilement, but by the representation of the defendant that she was pure when he knew that she was impure, in order to bring about the marriage.

It is difficult to see why a fraud which, if practiced with reference to a contract relating to property merely, would support an action, should not be given the same effect when it involves a contract affecting, not only property rights, but also the most sacred relation of life. Fraudulent representations with reference to the amount of property belonging to either party to a proposed marriage, made by a third person for the purpose of bringing about the marriage, are held to constitute an actionable wrong, and the usual remedy is to require the person guilty of the fraud to make his representations good. Piper v. Hoard, *supra;* Montefiori v. Montefiori, 1 W. Bl. 363; Ath. Mar. Sett. 484. In such cases the injury is more tangible, and the measure of damages more readily applied, than in the case before us; but both rest upon the principle that he who by falsehood and fraud induces a man to marry a woman is guilty of a wrong that may be remedied by an action, the amount of damages to be recovered depending upon the circumstances of the particular case.

We have thus far considered the right of action as resting upon some pecuniary loss, which, although trifling in amount, may be recovered as a matter of right, leaving it to the jury, in their sound

discretion, as in a case for the seduction of a child or servant, to amplify the damages by way of punishment and example. We think, however, that the action can be maintained upon a broader and more satisfactory ground, and that is the loss of consortium, or the right of the husband to the conjugal fellowship and society of his wife. The loss of consortium through the misconduct of a third person has long been held an actionable injury without proof of any pecuniary loss. Bennett v. Bennett, 116 N. Y. 584, 23 N. E. 17, Hutcheson v. Peck, 5 Johns, 196; Hermance v. James, 32 How. Prac. 142. As has been well said by a recent writer: "To entice away, or corrupt the mind and affection of, one's consort, is a civil wrong, for which the offender is liable to the injured husband or wife. The gist of the action is not in the loss of assistance, but the loss of consortium of the wife or husband, under which term are usually included the person's affection, society, or aid." Bigelow, Torts, 153. The damages are caused by the wrongful deprivation of that to which the husband or wife is entitled by virtue of the marriage contract. They rest upon the loss of a right which the marriage relation gives, and of which it is an essential feature. Whether that right is wrongfully taken away after it is acquired, or the person entitled to it is wrongfully prevented from acquiring it, does not change the effect or lessen the injury. While the plaintiff has not been actually deprived of the society of his wife, he has been deprived of that which made her society of any value, the same as if she had been seduced after marriage. Although the formal right to consortium may remain, the substance has been taken away. In other words, when he entered into the marriage relation he was entitled to the company of a virtuous woman, yet through the fraud of the defendant that right never came to him. He has never enjoyed the chief benefit springing from the contract of marriage, which is the comfort, founded upon affection and respect, derived from conjugal society. If the defendant had deprived the plaintiff of his right to consortium after marriage, the law would have afforded a remedy by the award of damages. Yet the plaintiff, through the fault of the defendant, has suffered a loss of the same nature and to the same extent, except that, instead of losing what he once had, he has been prevented from getting it when he was entitled to it. This is a difference in form only, and is without substantial foundation. The injury, although affected by fraud before marriage, instead of by seduction after marriage, was the same, and why

should not the remedy be the same? While the method of inflicting the injury is not the same, as it is tortious in character, has substantially the same effect, and causes damages of the same nature and to the same extent, why should damages be recovered in the one case if not in the other? Where false representations are willfully made as to a material fact, for the purpose of inducing another to act upon them, and he does so act to his injury, he may recover such damages as proximately result from the deception.

The representations in this case, as the jury has found, were made to promote the marriage, and they were false, as the defendant well knew. They were clearly material. The plaintiff acted upon them, and was thereby injured; for he made a contract entitling him to certain rights, which he has not received, and which the defendant knew he could never receive. Here are all the elements of a good cause of action founded upon fraud resulting in damage. The contract induced by the fraud was of a peculiar nature, but it was in law simply a contract, conferring certain rights, and imposing certain obligations. While it is not agreeable to treat a subject of sacred importance upon this narrow basis, it is necessary to do so, for our law considers marriage in no other light than as a civil contract. If the defendant had induced the plaintiff to enter into any other contract by making false statements of fact, which if true would have made the contract more valuable, he would have been liable for all the damages that naturally resulted. If he had induced the very marriage contract under consideration by representing to the plaintiff that he owed his proposed wife a certain sum of money, according to the common law, which entitles the husband to the personal property of his wife, he could have been compelled to make his representations good by the payment of that sum. Montefiori v. Montefiori, *supra;* Redman v. Redman, 1 Vern. 348; Neville v. Wilkinson, 1 Brown, Ch. Cas. 543; Scott v. Scott, 1 Cox. 378.

These cases, as well as the more important case of Piper v. Hoard, *supra*, rest upon the principle that fraudulent representations as to the pecuniary condition of one party to a proposed marriage, made by a third person to the other party thereto, in order to promote the marriage, are actionable, and authorize the recovery of such damages as may be proved. In this case we have a representation that did not relate to property directly, although it involved rights in the nature of property, but did relate to character, and so vitally that its falsity was destructive of all happiness belonging to the plaintiff

by virtue of his marriage. The injury was not merely sentimental, for, as has been shown, it extended to a right which the law recognizes as of pecuniary value, and for the wrongful destruction of which it awards damages. We think that the facts found warrant the recovery, and, after examining all the exceptions, are of the opinion that the judgment should be affirmed, with costs.

All concur, except BARTLETT, J., not voting. Judgment affirmed.

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§ 4.—BREACH OF LEGAL DUTY NECESSARY.

BORLEY v. WALFORD.

(9 Q. B. 197.—1846.)

LORD DENMAN, C. J. The declaration, in substance, states that the plaintiff was a dealer in printed silk goods, and had sent the defendant divers lots of such goods, the last of which contained handkerchiefs which had been printed by plaintiff with a certain ornamental pattern, and that he was about to print others in the same manner for profit, all which was known to the defendant; yet defendant, contriving and craftily and subtilely intending to deceive, injure, and defraud the plaintiff, and to induce him to desist from so printing the same, and deprive him of the profits, and to acquire the same for his own sole use and benefit, and put him to great and unnecessary expense, falsely, fraudulently and deceitfully represented and affirmed to the plaintiff, of and concerning the said last lot, and the said handkerchiefs, that in the said last lot there was a copy of a registered pattern, and that the parties intended to proceed against the plaintiff in the most expensive manner, by injunction and order through the Court of Chancery (thereby meaning that the said pattern was a copy of a pattern registered according to the statutes, etc.), whereas in fact no such pattern had been registered, etc. And no parties did so intend as the defendant well knew: in consequence of which false representation plaintiff was induced to take a long journey, from Glasgow to London, for the purpose of inquiring into these matters, and of satisfying such supposed parties, and was hindered in his trade, and refrained from making goods of that kind according to orders theretofore received, etc.

To this declaration the defendant demurred generally.

The judgment which was given in this court in Evans v. Collins,

affirming the proposition that every false statement made by one person and believed by another, and so acted upon as to bring loss upon him, constituted a grievance for which the law gives a remedy by action, has been overruled by the Court of Exchequer Chamber (Collins v. Evans, 5 Q. B. 820), which did not deny the authority of Humphreys v. Pratt, 5 Bligh, N. S. 154, in the House of Lords, but thought it might be distinguished from Evans v. Collins. Whether, in point of reasoning, that distinction is very satisfactory, we need not inquire; for, having been established by the Court of Error, it must prevail. And, on the more general subject, we must admit the reasonableness of the doctrine there at length laid down. For, if every untrue statement which produces damage to another would found an action at law, a man might sue his neighbor for any mode of communicating erroneous information, such, for example, as having a conspicuous clock too slow, since plaintiff might be thereby prevented from attending to some duty, or acquiring some benefit. A doctrine creating legal responsibility in cases so numerous and so free from blame must be restrained within some limits. But an averment that the falsehood of this representation was known to him, and that he knowingly and willfully uttered it, seems to carry the matter somewhat farther. If indeed the defendant were under any legal obligation to state the truth correctly to the plaintiff, there would be a grievance in misleading him, for which an action on the case would lie: still more so if he made the false representation, with a view to some unfair advantage to himself. Now here, on minutely examining the allegations, though not very scientifically made, we think it sufficiently appears that the defendant uttered knowingly a deliberate falsehood on this subject, with a view to his own lucre. It is averred that he did so, with the design to deprive the plaintiff of the benefit of the last lot of goods, and to acquire it for his own sole use: and it is very plain that this object might have been effected in the manner alleged, (by deterring plaintiff from bringing his goods into the market.) The defendant has no right to say that the plaintiff was wrong in giving him credit for the truth of what he said; and there is no doubt that the special damage naturally flowed from the plaintiff's confidence in the defendant's false assertion. We think, therefore, that the plaintiff has stated a good cause of action; and the demurrer must be overruled.

CLARK v. GAY.

(112 Ga. 777; 38 S. W. 81.—1901.)

LEWIS, J. * * * 1. After a careful study of the petition, the only definite purpose that we can gather from it is to recover the value of the plaintiff's house on account of the defendant's unlawfully pursuing a servant of the plaintiff and killing him in the house. There is no allegation of actual physical damage done the house, nor is there anything to show that it was not in as good condition after the homicide as before. We cannot imagine therefore, how the value of the house can be made the measure of the damage alleged to have been caused by the wrongful conduct of the defendant.

2. The petition in this case is too loose and indefinite to support a recovery of any kind. We do not mean to say that the conduct charged against the defendant could not be made the basis of a valid civil action against him in favor of the plaintiff. An action might have been sustained for the unlawful killing of the plaintiff's servant to recover damages for the loss of the services of the servant. There might also have been a suit for trespass and invasion of the plaintiff's home, or for injury to his peace and happiness, resulting from the outrage committed in the presence of his family. This suit, however, embraces none of these elements. Taken as a whole, the petition excludes the idea that the plaintiff is seeking damages of any kind save those mentioned in the preceding division of this opinion, and it is too indefinite to be sustainable on any theory.

Judgment affirmed. All the justices concurring, except COBB, J.[1]

[1] In Cleveland, C. C. & St. L. Ry. v. Jenkins, 174 Ill. 398, 51 N. E. 811, 66 Am. St. R. 296 (1898), the court said: "A further citation of authorities is unnecessary to establish that by common law no liability was imposed upon the master to issue any form of character to his servant. By statute no duty is imposed upon the employer to give an employé a clearance card, nor does any right to demand such accrue to the employé. Therefore, if any cause of action exists to the appellee in this case, it must arise out of his contract of employment, or there must be shown and established such a custom or usage as would clearly entitle him to such. Under such views of the subject-matter involved in this case, where no action, either by law or by statute, accrued to the plaintiff, it was necessary for him to produce, in the first instance, evidence tending to show that a usage or custom existed on appellant's railroad, at the time of his contract of employment, to give to each discharged employé, or those voluntarily quitting its service, a clearance card or certificate recommendation, and tending to show he was entitled to it under his contract of employment."

§ 5.—OPTION TO SUE ON CONTRACT OR IN TORT.

HOLDEN v. RUTLAND RY. CO.

(72 Vt. 156; 47 At. 408.—1900.)

THOMPSON, J. The declaration alleges that the plaintiff applied to the defendant's ticket agent at Burlington, Vt., for such a ticket as would entitle the plaintiff to be transported by the defendant over its railroad the distance of 1,000 miles, and that he paid $20 for such a ticket, and thereupon received from said agent a ticket which he represented to the plaintiff entitled him to be so carried over the defendant's railroad; that in writing on said ticket the name of the person entitled to use it said agent carelessly and negligently, and without the fault of the plaintiff, wrote thereon the name of A. F. Holden, instead of D. F. Holden, the name of the plaintiff; that thereafterwards, while there were still attached to said ticket coupons representing more than 67 miles, the distance between Burlington and Rutland, the defendant received the plaintiff as a passenger upon its train to transport him from Burlington to Rutland, and that while he was being so transported the defendant refused, by its conductor, to receive said ticket in payment of plaintiff's fare. Other facts are set forth, and other wrongs and injuries are alleged in the declaration, which it is not necessary for us to consider under the defendant's general demurrer.

There is an allegation that all the wrongs and injuries set forth were the direct result of said carelessness and negligence of said agent, and without lack of due care on part of the plaintiff.

The defendant contends that the plaintiff has mistaken the form of his action, and that it should have been assumpsit, instead of case. Without doubt he could maintain an action of assumpsit on a promise implied by law from the facts stated in his declaration, but that is not decisive of his right to maintain an action on the case. In 1 Chit. Pl. (14th Am. Ed.) *135, the rule is stated to be this: "Where from a given state of facts the law raises a legal obligation to do a particular act, and there is a breach of that obligation, and a consequential damage, there, although assumpsit may be maintainable upon a promise implied by law to do the act, still an action on the case founded in tort is the more proper form of action,

in which the plaintiff in his declaration states the facts out of which the legal obligation arises, the obligation itself, the breach of it, and the damage resulting from that breach." Burnett v. Lynch, 5 Barn. & C. 609. It was the duty of the defendant, under the facts stated in the declaration, to deliver to the plaintiff such a ticket as would entitle him to the transportation on its railroad for which he paid, and upon presentation of such ticket to transport him on proper trains until it was used up. For the breach of this duty, arising from the negligence of the defendant's agents, which in law is its negligence, the plaintiff can maintain an action on the case for the damages accruing to him from such breach of duty.

The *pro forma* judgment sustaining the demurrer and adjudging the declaration insufficient, and for the defendant to recover its costs, is reversed, and the demurrer is overruled, and the declaration is adjudged sufficient, and cause remanded.

CONLEY v. BLINEBRY.

(20 Misc. [N. Y.] 871.—1899.)

FORBES, J. Under the present practice, this action may be denominated an action in tort. If the proof is sufficient to warrant a recovery, the complaint is sufficient, in the averments therein, to afford relief in one of two forms: In fraud, or in conversion.

On the 4th day of May, 1897, the plaintiff sold and conveyed to the defendant a house and a small farm containing about five acres of land, situate in this county. The purchase price was fixed at $550. The consideration was paid at the time, except the sum of $250, which was then and there secured by a bond, and a mortgage as security, covering the whole of said premises and made payable in one year from date, with interest. This mortgage remained unrecorded until February 3, 1898, and no part of the debt has been paid.

On the 11th day of October, 1897, the defendant sold and conveyed the whole of said premises to one Van Orstro, who took the title to said premises in good faith, paying $600, the full value of said premises, without notice of said bond and mortgage, recording his deed October 11, 1897, in the proper county. The purchaser

went into the immediate possession of said premises under his deed. The defendant received the whole sum of said purchase price and refused to pay said bond or any portion of said indebtedness, so secured by said mortgage.

This action was brought to recover damages in the sum of $250, and the interest thereon from the date of said bond and mortgage. The plaintiff claims to recover upon the theory that the defendant has destroyed the lien of the security so given by him to the plaintiff, without his knowledge or consent; and that the defendant has converted to his own use that portion of the purchase-money which was received by him under the deed to Van Orstro.

There are two counts in the complaint, but both counts clearly refer to the same transaction stated in somewhat different language, but when they are read together they make a complaint covering the facts as they appear from the evidence on the trial. On these facts is the plaintiff entitled to recover in this action?

I do not think the action is a novel one; the principle has been decided in several cases, but no case which covers these precise facts has been cited, nor has a case been found in this State.

The defendant by his conduct has destroyed the plaintiff's mortgage lien upon said premises; cutting it off with full knowledge of the duty which he owed to the plaintiff to do nothing which would deprive him of his security, which defendant then knew plaintiff could not enforce until the payment on the bond fell due. Before that time arrived, the defendant had put into his own pocket the full value of said premises and held it there, telling the plaintiff to get it if he could.

The plaintiff had one of three remedies: *First*, to sue on the bond and enforce payment in that manner, if he could. *Second*, to bring an action in equity claiming a lien upon the fund held by the defendant, treating the fund as real estate, and enforcing his claim by execution if possible. Or, *third*, to bring the present action and enforce his claim by such remedies as this form of action may afford him, if he is entitled to maintain it in its present form.

When the plaintiff has been invited to bring an action, the defendant ought not, in morals at least, to complain of the form of the action. The novelty of the action ought not to bar its enforcement. Kujek v. Goldman, 150 N. Y. 176.

The novelty of the remedy by the plaintiff does not exceed the novelty of the attempt by the defendant to avoid his obligations.

The security was good until the defendant destroyed it, and between the parties it would have remained good except for its destruction by the defendant. Except for the conduct of the defendant, the security would have remained good, although unrecorded. The plaintiff as against the subsequent purchaser lost his security, by not recording his mortgage; but he lost his right to enforce his lien against the purchaser because the defendant defeated that claim by an unlawful act, which must have been performed by the defendant for that purpose. * * *

Judgment for plaintiff.

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§ 6.—QUASI TORT.

TAYLOR v. M. S. & L. RY.

(11 Times Law Reports, 27.—1894.)

LORD JUSTICE LINDLEY. This is an action brought in the High Court by the plaintiff, who was a passenger by the defendant Co.'s railway, to recover damages for an injury sustained by the negligence of the defendant's servant in slamming the door and jamming the plaintiff's hand. He recovered a verdict for £20; and now comes the question whether he is entitled to his full costs or not. That depends upon § 116 of the County Courts Act, 1888. (After quoting the section and remarking that it compels the Court to decide whether the action was founded on contract or on tort, he proceeds:) We no longer have to consider forms of actions, but we are compelled by the Legislature to put every action which can be brought in the County Court, but is brought in the High Court into one or the other of these two categories. Every one who has studied the English law will know perfectly well there is debatable ground between torts and contracts. There are what are called *quasi* contracts and *quasi* torts: and it is sometimes not easy to say whether a cause is founded on contract or on tort. Very often you put it either way; but here we are compelled to draw the line hard and fast and put every one of the actions in one class or the other. I have looked into the authorities, but it is only necessary, as I propose to do, to refer to those cases which bear upon the true construction of this Act of Parliament. I do not think anything would

be gained now by going into the old learning about the forms of actions. (After referring to Bryant v. Herbert, 3 C. P. D. 389; Pontifex v. Midland Ry., 3 Q. B. D. 23, and Fleming v. M. S. & L. Ry., 4 Q. B. D. 81, he continues:) Having studied these cases with care, it appears to me, that this is an action founded on tort. That which caused the injury was not an act of omission, it was not a mere misfeasance; it was not merely the not taking such care of the plaintiff as by the contract the defendants were bound to take, but it was an act of misfeasance—it was positive negligence in jamming his hand. Contract or no contract, he could maintain an action for that. All he would have to prove would be that he was lawfully on the premises of the railway company, and the contract is merely a part of the history of the case. I do not think it would be possible, without running contrary to the reasoning of the Court of Appeal in Bryant v. Herbert, which reversed the decision of Mr. Justice DENMAN and myself in the same case to hold that, within the meaning of the County Courts Act, this is an action founded on contract as distinguished from tort. * * * *

CHAPTER III.

HARMS THAT ARE NOT TORTS.

§ 1.—HARM MUST BE UNLAWFUL.

BECKWITH v. PHILBY.

(6 Barnwell & Cresswell, 635.—1827.)

THIS was an action for assaulting, beating, handcuffing, and imprisoning the plaintiff; and keeping and detaining him handcuffed and imprisoned, without reasonable or probable cause, for forty-eight hours, on a false and pretended charge of felony.

LORD TENTERDEN, C. J. I am of opinion that there is no ground for disturbing the verdict. Whether there was any reasonable cause for suspecting that the plaintiff had committed a felony, or was about to commit one, or whether he had been detained in custody an unreasonable time, were questions of fact for the jury, which they have decided against the plaintiff, and in my judgment most correctly. The only question of law in the case is, whether a constable having reasonable cause to suspect that a person has committed a felony, may detain such person until he can be brought before a justice of the peace to have his conduct investigated. There is this distinction between a private individual and a constable: in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed; whereas a constable, having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected until inquiry can be made by the proper authorities. Now in this case it is quite clear upon the evidence, and the jury have so found, that the conduct of the plaintiff had given the defendants just cause for

[1] **Defendant suspected plaintiff of having stolen a horse; but plaintiff was wholly innocent.**

suspecting that he either had committed, or was about to commit, a felony, and the jury having so found, I am of opinion that the action was not maintainable.

Rule refused.

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§ 2.—HARMS BY LEGISLATORS.

KILBOURN v. THOMPSON, ET AL.

(103 U. S. 168.—1881.)

MILLER, J. The plaintiff in error sued the defendant in that court in an action of trespass for false imprisonment, charging them with taking him from his house with force and arms and detaining him as a prisoner in the common jail of the District for forty-five days without any reasonable or probable cause, contrary to law and against his will.

Michael C. Kerr, who was also sued as one of the defendants, died before service of process, and the suit abated as to him.

John G. Thompson pleaded separately; first, the general issue; and secondly, a special plea of justification, which will be more fully considered, founded on the fact that in what he did he acted as sergeant-at-arms of the House of Representatives of the Congress of the United States, and under its orders.

The other defendants pleaded jointly the general issue, and a plea of justification similar to Thompson's, except that they alleged themselves to have been members of the House of Representatives, and members of a committee of that house, and that what they did was in that capacity and was warranted by the circumstances, which they fully set out in the plea.

To both these special pleas the plaintiff demurred, and his demurrer being overruled, a judgment was rendered for the defendants. The case therefore stands before us as it did in the Supreme Court of the District, on the sufficiency of these special pleas. They are somewhat long, are very full in their statement of the facts which are supposed to justify the imprisonment of the plaintiff, and relying as they do on the privileges of the House of Representatives, they present a question, or rather questions, of serious importance for our consideration. * * * *

We are of the opinion, for these reasons, that the resolution of the

House of Representatives authorizing the investigation, was in excess of the power conferred on that body by the Constitution; that the committee, therefore, had no lawful authority to require Mr. Kilbourn to testify as a witness beyond what he voluntarily chose to tell; that the orders and resolutions of the house, and the warrant of the speaker, under which Mr. Kilbourn was imprisoned, are in like manner void for want of jurisdiction in that body, and that his imprisonment was without any lawful authority. * * * *

But we have found no better expression of the true principle on this subject than the language of Mr. Justice Hoar, in the Supreme Court of Massachusetts, reported in 14 Gray, 238, in the case of Burnham v. Morrissey. That was a case in which the plaintiff was imprisoned under an order of the House of Representatives of the Massachusetts Legislature for refusing to answer certain questions as a witness and to produce certain books and papers. The opinion, or statement rather, was concurred in by all the court, including the venerable Chief Justice Shaw.

"The House of Representatives (says the court) is not the final judge of its own power and privileges in cases in which the rights and liberties of the subject are concerned, but the legality of its action may be examined and determined by this court. That house is not the Legislature, but only a part of it, and is therefore subject in its action to the law in common with all other bodies, officers and tribunals within the Commonwealth. Especially is it competent and proper for this court to consider whether its proceedings are in conformity with the Constitution and laws, because living under a written Constitution, no branch or department of the government is supreme, and it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the Legislature in the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void. The House of Representatives has the power under the Constitution to imprison for contempt, and the power is limited to the cases expressly provided for by the Constitution, or to cases where the power is necessarily implied from these constitutional functions and to the proper performance of which it is essential."

In this statement of the law, and in the principles there laid down, we fully concur.

We must therefore hold, that the resolution of the House of Representatives finding Mr. Kilbourn guilty of contempt, and the warrant of its speaker for his commitment to prison, are not conclusive in this case, and in fact are no justification, because, as the whole plea shows, the house was without authority in the matter.

It remains to consider the matter special to the other defendants set out in their plea, which claims the protection due to their character as members of the House of Representatives. In support of this defense they allege that they did not in any manner assist in the arrest of Kilbourn or his imprisonment, nor did they order or direct the same, except by their votes and by their participation as members in the introduction of, and assent to, the official acts and proceedings of the house, which they did and performed as members of the house in the due discharge of their duties, and not otherwise.

As these defendants did not make the actual assault on the plaintiff, nor personally assist in arresting or confining him, they can only be held liable on the charge made against them as persons who *had* ordered or directed in the matter, so as to become responsible *for* the acts which they directed.

The general doctrine that the person who procures the arrest of another by judicial process, by instituting and conducting the proceedings, is liable to an action for false imprisonment, where he acts without probable cause, is not to be controverted. Nor can it be denied that he who assumes the authority to order the imprisonment of another is responsible for the acts of the person to whom such order is given, when the arrest is without justification. The plea of these defendants shows that it was they who initiated the proceedings under which plaintiff was arrested. It was they who reported to the house his refusal to answer the questions which they had put to him, and to produce the books and papers which they had demanded of him. They expressed the opinion in that report that plaintiff was guilty of a contempt of the authority of the house in so acting. It is a fair inference from this plea, that they were the active parties in setting on foot the proceedings by which he was adjudged guilty of a contempt, and in procuring the passage of that resolution.

If they had done this in any ordinary tribunal, without probable cause, they would have been liable for the action which they had thus promoted.

The House of Representatives is *not* an ordinary tribunal. The

defendants set up the protection of the Constitution, under which they do business as part of the Congress of the United States. That Constitution declares that the Senators and Representatives "shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place."

Is what the defendants did in the matter in hand covered by this provision? Is a resolution offered by a member speech or debate, within the meaning of the clause? Does its protection extend to the report which they made to the house of Kilbourn's delinquency? To the expression of opinion that he was in contempt of the authority of the house? To their vote in favor of the resolution under which he was imprisoned? If these questions be answered in the affirmative, they cannot be brought in question for their action in a court of justice or in any other place. And yet, if a report, or a resolution, or a vote is not speech or debate, of what value is the constitutional protection? * * * *

Many of the colonies, which afterward became States in our Union, had similar provisions [1] in their charters or in bills of rights, which were part of their fundamental laws, and the general idea in all of them, however expressed, must have been the same and must have been in the minds of the members of the constitutional convention. In the Constitution of the State of Massachusetts of 1780, adopted during the war of the Revolution, the twenty-first article of the bill of rights embodies the principle in the following language:

"The freedom of deliberation, speech and debate in either house of the Legislature is so essential to the rights of the people that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever."

This article received a construction as early as 1808 in the Supreme Court of that State in the case of Coffin v. Coffin, 4 Mass. 1, in which Chief Justice PARSONS delivered the opinion. The case was an action for slander, the offensive language being used in a conversation in the House of Representatives of the Massachusetts Legislature. The words were not delivered in the course of a reg-

[1] Reference is here made to the Bill of Rights securing "freedom of speech, and debates, and proceedings in Parliament." [Ed.]

ular address or speech, though on the floor of the house while in session, but were used in a conversation between three of the members when neither of them were addressing the chair. It had relation however to a matter which had a few moments before been under discussion. The court, speaking of this article of the bill of rights, the protection of which had been invoked in the plea, said: "These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the right of the people by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I therefore think (said the chief justice) that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate, but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature and the execution of the office. And I would define the article as securing to every member exemption from prosecution for everything said or done by him as a representative in the exercise of the functions of that office, without inquiring whether the exercise was regular, according to the rules of the house, or irregular and against those rules. I do not confine the member to his place in the house; and I am satisfied that there are cases in which he is entitled to this privilege when not within the walls of the representatives' chamber."

The report states that the other judges, namely, SEDGWICK, SEWALL, THACHER and PARKER, concurred in the opinion.

This is, perhaps, the most authoritative case in this country on the construction of the provision in regard to freedom of debate in legislative bodies, and being so early after the formation of the Federal Constitution, is of much weight. We have been unable to find any decision of a Federal court on this clause of the section 6 of article I, though the previous clause of the same section concerning exemption from arrest has been often construed.

Mr. Justice STORY (§ 866 of his Commentaries on the Constitution) says: "The next great and vital privilege is the freedom of speech and debate, without which all other privileges would be comparatively unimportant or ineffectual. This privilege also (he says) is derived from the practice of the British Parliament, and was in full exercise in our colonial legislation, and now belongs to the legislation of every State in the Union as matter of constitutional right."

It seems to us that the views expressed in the authorities we have cited are sound and applicable to this case. It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committee, to resolutions offered, which though in writing must be reproduced in speech, and to the act of voting whether it is done vocally or by passing between the tellers. In short, to things generally done in a session of the house by one of its members in relation to the business before it.

It is not necessary to decide here that there may not be things done, in the one house or the other, of an extraordinary character, for which the members who take part in the act may be held legally responsible. If we could suppose the members of these bodies so far to forget their high functions and the noble instrument under which they act as to imitate the Long Parliament in the execution of the Chief Magistrate of the nation, or to follow the example of the French Assembly in assuming the function of a court for capital punishment, we are not prepared to say that such an utter perversion of their powers to a criminal purpose would be screened from punishment by the constitutional provision for freedom of debate. In this, as in other matters which have been pressed on our attention, we prefer to decide only what is necessary to the case in hand, and we think the plea set up by those of the defendants who were members of the house is a good defense, and the judgment of the court overruling the demurrer to it and giving judgment for those defendants is affirmed.

As to Thompson, the judgment is reversed and the case remanded for further proceedings.

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§ 3.—HARMS BY JUDICIAL OFFICERS

GROVE v. VAN DUYN.

(44 N. J. L. 654.—1882.)

This was an action for trespass for assault and unlawful imprisonment. The defendant, Cornelius Van Duyn, pleaded the general issue of not guilty to the declaration, which was in its usual form in trespass, for assault and unlawful imprisonment.

The defendant, Charles L. Stout, also pleaded the general issue to the said declaration, and gave the notice of special matter in evidence under said plea, setting up that he was one of the justices of the peace of the county of Middlesex, and that upon the sworn complaint of Cornelius Van Duyn, he issued his warrant in the ordinary form, directing the persons named in the complaint to be brought before him to answer, and such three persons having been arrested by a constable, on such warrant, and being brought before said justice, and having waived an examination, were by him committed to the jail of the county for the cause mentioned in the complaint, to await the action of the next grand jury. Having given bail the next day the persons so arrested were discharged, and thereupon one of them, William H. Grove, Jr., brought this suit in trespass for the above-mentioned imprisonment. At the trial the plaintiff was nonsuited, and to review that judgment this writ of error was brought.

BEASLEY, Ch. J. Most of the general principles of law pertaining to that branch of this controversy which relates to the alleged liability of the defendant in this suit, who was a justice of the peace, are so completely settled as not to be open to discussion. The doctrine that an action will not lie against a judge for a wrongful commitment, or for an erroneous judgment, or for any other act made or done by him in his judicial capacity, is as thoroughly established as are any other of the primary maxims of the law. Such an exemption is absolutely essential to the very existence, in any valuable form, or of the judicial office itself; for a judge could not be either respected or independent if his motives for his official actions or his conclusions, no matter how erroneous, could be put in question at the instance of every malignant or disappointed suitor. Hence we find this judicial immunity has been conferred by the laws of every civilized people. That it exists in this State in its fullest extent, has been repeatedly declared by our own courts. Such was pronounced by the Supreme Court to be the admitted principle in the case of Little v. Moore, 1 South. 75; Taylor v. Doremus, 1 Harr. 473; Mangold v. Thorpe, 4 Vroom, 134; and by this court in Loftus v. Fraz, 14 Vroom, 667. To this extent there is no uncertainty or difficulty whatever in the subject.

But the embarrassment arises where an attempt is made to express with perfect definiteness when it is, that acts done by a judge and which purport to be judicial acts, are such within the meaning of the rule to which reference has just been made.

It is said everywhere in the text-books and decisions, that the officer, in order to entitle himself to claim the immunity that belongs to judicial conduct, must restrict his action within the bounds of his jurisdiction, and jurisdiction has been defined to be "the authority of the law to act officially in the particular matter in hand." (Cooley on Torts, 417.) But these maxims, although true in a general way, are not sufficiently broad to embrace the principle of immunity that appertains to a court or judge exercising a general authority. Their defect is that they leave out of the account all those cases in which the officer in the discharge of his public duty is bound to decide whether or not a particular case, under the circumstances as presented to him, is within his jurisdiction, and he falls into error in arriving at his conclusion. In such instance, the judge, in point of fact and law, has no jurisdiction according to the definition just given, over "the particular matter in hand," and yet, in my opinion, very plainly he is not responsible for the results that wait upon his mistake. And it is upon this precise point that we find confusion in the decisions. There are certainly cases which hold that if a magistrate in the regular discharge of his functions, causes an arrest to be made under his warrant on a complaint which does not contain the charge of a crime cognizable by him, he is answerable in an action for the injury that has ensued. But I think these cases are deflections from the correct rule, they make no allowance for matters of doubt and difficulty. If the facts presented for the decision of the justice are of uncertain signification with respect to their legal effect, and he decides one way, and exercises a cognizance over the case; if the superior court in which the question arises in a suit against the justice differs with him on this close legal question, is he open, by reason of his error, to an attack by action? If the officer's exemption from liability is to depend on the question whether he had jurisdiction over the particular case, it is clear that such officer is often liable under such conditions, because the higher court, in deciding a doubtful point of law, may have declared that some element was wanting in the complaint which was essential to bring this case within the judicial competency of the magistrate. But there are many decisions which, perhaps, without defining any very clear rule on the subject, have maintained that the judicial officer was not liable under such conditions. The very copious brief of the counsel of the defendants abounds in such illustrations. As an example, we may refer to the old case of Gwynne v. Poole, 2 Lutw. 387, in which

it was held that the justice was justified because he had reason to believe that he had jurisdiction, although there was an arrest in an action which arose out of the justice's jurisdiction. This case has been since approved in Kemp v. Neville, 10 C. B. (N. S.) 550. Here, if the test of official liability had been the mere fact of the right to take cognizance over the particular matter in hand, considered in the light of strict legal rules, this decision would have been the opposite of what it is. In the same way the subject is elucidated in Britain v. Kinnard, 1 B. & B. 432, the facts being a conviction by a justice of a person of having gunpowder in a certain boat, a special act authorizing the detention of any suspected boat; and when the magistrate was sued in trespass for an illegal conviction, it was declared that the plaintiff, in order to show the defendant's want of cognizance over the proceedings leading to the conviction, could not give evidence that the craft in question was a vessel and not a boat, because the justice had judicially determined that point. And in this case likewise, the test of jurisdiction in the magistrate in point of fact and of law, was rejected; an inquiry into the authority, by force of which the proceedings had been taken, being disallowed for the reason that such question had been passed by the magistrate himself, the point being before him for adjudication. The same doctrine was promulged in explicit and forcible terms by Mr. Justice FIELD, delivering the opinion of the Supreme Court of the United States, in the case of Bradley v. Fisher, 13 Wall. 335, this being his language: "If a judge of criminal court, invested with general criminal jurisdiction over offenses committed within a certain district, should hold a particular act to be a public offense, which is not, and proceed to the arrest and trial of a party charged with such act, . . . no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him; for these are particulars for his judicial consideration, whenever this general jurisdiction over the subject matter is invoked."

These decisions, in my estimation, stand upon a proper footing, and many others of the same kind might be referred to, but such course is not called for, as it must be admitted that there is much contrariety of results in this field, and the references above given are amply sufficient as illustrations for my present purposes. The assertion, I think, may be safely made, that the great weight of judi-

cial opinion is in opposition to the theory that if a judge, as a matter of law and fact, has not jurisdiction over the particular case, that thereby, in all cases, he incurs the liability to be sued by any one injuriously affected by his assumption of cognizance over it. The doctrine that an officer having general powers of judicature, must, at his peril, pass upon the question, which is often one difficult of solution, whether the facts before him place the given case under his cognizance, is as unreasonable as it is impolitic. Such a regulation would be applicable alike to all courts and to all judicial officers acting under a general authority, and it would thus involve in its liabilities all tribunals except those of last resort. It would also subject to suit persons participating in the execution of orders and judgments rendered in the absence of a real ground of jurisdiction. By force of such a rule, if the Supreme Court of this State, upon a writ being served in a certain manner, should declare that it acquired jurisdiction over the defendant, and judgment should be entered by default against him, and if, upon error brought, this court should reverse such judgment on the ground that the service of the writ in question did not give the inferior court jurisdiction in the case, no reason can be assigned why the justices of the Supreme Court should not be liable to suit for any injurious consequence to the defendant proceeding from their judgment. As I have said, in my judgment, the jurisdictional test of the measure of judicial responsibility must be rejected.

Nevertheless, it must be conceded that it is also plain that in many cases a transgression of the boundaries of his jurisdiction by a judge, will impose upon him a liability to an action in favor of the person who has been injured by such excess. If the magistrate should, of his own motion, without oath or complaint being made to him, on mere hearsay, issue a warrant and cause an arrest for an illegal larceny, it cannot be doubted that the person so illegally imprisoned could seek redress by a suit against such officer. It would be no legal answer for the magistrate to assert that he had a general cognizance over criminal offenses, for the conclusive reply would be, that particular case was not, by any form of proceeding, put under his authority.

From these legal conditions of the subject my inference is, that the true general rule with respect to the actionable responsibility of a judicial officer having the right to exercise general powers, is, that he is so responsible in any given case belonging to a class over which

he has cognizance, unless such case is by complaint or other proceeding put at least colorably under his jurisdiction. Where the judge is called upon by the facts before him to decide whether his authority extends over the matter, such an act is a judicial act, and such officer is not liable in a suit to a person affected by his decision, whether such decision be right or wrong. But when no facts are present, or only such facts as have neither legal value nor color of legal value in the affair, then, in that event, for the magistrate to take jurisdiction is not, in any manner, the performance of a judicial act, but simply the commission of an unofficial wrong. This criterion seems a reasonable one; it protects a judge against the consequences of every error of judgment, but it leaves him answerable for the commission of wrong that is practically willful; such protection is necessary to the independence and usefulness of the judicial officer, and such responsibility is important to guard the citizen against official oppression.

The application of the above-stated rule to this case must, obviously, result in a judgment affirming the decision of the Circuit Judge. There was a complaint, under oath, before this justice, presenting for his consideration a set of facts to which it became his duty to apply the law. The essential things there stated were, that the plaintiff, in combination with two other persons, " with force and arms," entered upon certain lands, and " with force and arms did unlawfully carry away about four hundred bundles of cornstalks, of the value," etc., and were engaged in carrying other cornstalks from said lands. By a statute of this State (Rev. p. 244, Sec. 99), it is declared to be an indictable offense, " if any person shall willfully, unlawfully and maliciously " set fire to or burn, carry off or destroy any barrack, cock, crib, rick or stack of hay, corn, wheat, rye, barley, oats or grain of any kind, or any trees, herbage, growing grass, hay or other vegetables, etc. Now, although the misconduct described in the complaint is not the misconduct described in this act, nevertheless the question of their identity was *colorably* before the magistrate, and it was his duty to decide it; and under the rule above formulated, he is not answerable to the person injured for his erroneous application of the law to the case that was before him.

As to the other defendant, all he did was to make his complaint on oath before the justice, setting forth the facts truly, and for such an act he could not be held liable for the judicial action which ensued, even if such action had been extra-judicial. But as the case

was, as we have seen, brought within the jurisdiction of the judicial officer, neither this defendant, nor any other person could be treated as a trespasser for his coöperation in procuring a decision and commitment which were valid in law, until they had been set aside by a superior tribunal.

Let the judgment be affirmed.

WEBB v. FISHER.

(109 Tenn. 101; 72 S. W. 110.—1903.)

McALISTER, J. The question presented upon this record is in respect of the liability of a judicial officer for certain official acts which are alleged to have been done oppressively, maliciously, and corruptly. The more specific allegations of the declaration are that the defendant, T. J. Fisher, as chancellor of the Fifth chancery division of Tennessee, decided against plaintiff the cause of W. H. Cummings, relator, against B. M. Webb, in the chancery court at Smithville, Tenn., in which a decree of disbarment was made and entered against plaintiff, a practicing attorney and counsel and solicitor in the courts of said state, and that said decree was pronounced corruptly, maliciously, wickedly, and oppressively. There are other allegations in the declaration, which are not necessary to be mentioned, since the statement already made presents the real case as made, stripped of useless verbiage and immaterial recitals. To this declaration defendant filed a plea of not guilty. At the July term, 1902, defendant asked leave of the court to withdraw his plea, and file a demurrer to the declaration, assigning for cause the exemption of a judicial officer from such a suit; but this motion was disallowed. At the November term, 1902, the presiding judge, Hon. Joseph C. Higgins, being of opinion that the declaration stated no cause of action, dismissed the suit. Plaintiff appealed, and has assigned errors.

The precise question with which we are now confronted has not heretofore been decided in this state, so far as we are advised by any reported opinion. The case of Hoggatt v. Bigley, 6 Humph. 237, involved the liability of a justice of the peace for acts done in his official capacity. Green, J., in delivering the opinion of the court, said: "The only question is whether the justice of the peace had

jurisdiction of the case against the slave, Jim, whom he committed to prison; for it is not contended that a judicial officer is responsible for mere errors of judgment in a case of which he has jurisdiction, and in which, without malice, he honestly pronounces what he believes to be the judgment of the law." It was not contended in that case that the official act was done maliciously or corruptly, but the contrary appeared. The case of Cope v. Ramsey, 2 Heisk. 197, was a bill filed by the next friend of a minor against the defendants, as justices of Warren county, to hold them personally liable for a sum of money paid into the hands of the clerk of said court in Confederate money. The bill charged that all the parties defendant combined and confederated together to cheat and defraud said minor in this transaction; but the court found there was no proof to throw suspicion on the defendants. A demurrer was incorporated in the answer, which assigned that defendants were not responsible for acts done in a judicial capacity, and that the bill failed to charge that said acts were done with a corrupt, malicious, or fraudulent purpose. SNEED, J., said: "If they (the justices), in the rendition of the order complained of, have done the complainants wrong by an honest error of judgment, they are not responsible for it, pecuniarily or otherwise. But," continued the court, "if they have acted corruptly, maliciously, and with purpose, to defraud the complainant of his rights, then in an appropriate proceeding they are responsible. The bill does not make out such a case. It does not impute to these justices any corrupt or dishonest motive touching this judicial act, and the bill is therefore demurrable."

It will be observed that the rule announced in the two cases last cited related to the official liability of justices of the peace, who are held exempt when the act is within the justice's jurisdiction, unless it is inspired by motives of malice and corruption. But with respect to courts of superior and general jurisdiction a different rule has long obtained.[1] * * * * *

In the Am. & Eng. Ency. Law (2d Ed.) vol. 17, page 728, it is said, viz.: "The rule is well established that judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even where such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or cor-

[1] The Court cited and quoted from, Randall v. Brigham, 7 Wall. (U. S.) 523, 19 L. Ed. 285; Bradley v. Fisher, 13 Wall. (U. S.) 335, 20 L. Ed. 646; Scott v. Stansfield, 3 L. R. Ex. 220, and Philbrook v. Newman, 85 Fed. 139.

ruptly;" citing numerous cases. The only cases cited as holding a contrary doctrine are several cases from Kentucky and two cases from Tennessee. The latter, as we have already seen, lay down the rule with respect to the liability of justices of the peace, namely, Cope v. Ramsey, 2 Heisk. 197; Hoggatt v. Bigley, 6 Humph. 237.

A reason for a different rule with respect to the liability of justices of the peace may be found in the fact that under our constitution they are not liable to impeachment for crimes and misdemeanors in office, or removal from office for cause by a two-thirds vote of the general assembly. They are made liable to indictment and removal from office by the court upon conviction. Article 5, § 5, Const. 1870; Const. 1834, art. 5, § 5.

The rule exempting judges from liability for judicial acts is based upon the consideration that the judge represents the public. If, says Mr. Cooley, the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or an erroneous performance, must be a public, and not an individual, injury, and must be redressed, if at all, in some form of public prosecution. The duty is public, and the end to be accomplished is public. The individual loss results from the proper or improper and imperfect performance of a duty, for which his controversy is only the occasion. The judge performs his duty to the public by doing justice between individuals, or, if he fails to do justice between individuals, he may be called to account by the state in such form and before such tribunal as the law may have provided. But, as the duty neglected is not a duty to the individual, civil redress, as for a civil injury, is not admissible. This is only one reason for judicial exemption from individual suits. Cooley on Torts, 380, 381.

The necessary result of the liability would be to occupy the judge's mind and time with the defense of his own interests. The effect would be to lower the dignity of the court. Said Lord Tenterden, viz.; "In the imperfection of human nature it is better even that an individual should suffer a wrong than that the general courts of justice should be impeded and fettered by constant and perpetual restrains and apprehensions on the part of those who administer it." Quoted in Williamson v. Lacy, 86 Me. 80, 29 Atl. 943, 25 L. R. A. 506. These principles we believe to be sound, and apply in the present instance.

The result is the judgment below is affirmed.

NOTE. The decree of disbarment was reversed by the court of chancery appeals on the facts, and Mr. Webb reinstated as an attorney.

VAUGHN v. CONGDON.

(56 Vt. 111; 48 Am. R. 758.—1883.)

Trespass for false imprisonment. Pleas, general issue, and special plea in bar. Heard on demurrer to the special plea, September Term, 1881, Rutland county. Veazey, J., presiding, sustained the demurrer.

ROWELL, J. The statute provides that complaints and prosecutions for theft shall be commenced within six years after the commission of the offense, and that if a complaint, an information or indictment is brought, had, commenced or prosecuted after the time limited as aforesaid, "such proceeding shall be void and of no effect." The complaint exhibited to the defendant on November 12, 1880, alleged the offense to have been committed on September 20, 1874, more than six years before the bringing of the complaint, and the question is whether the defendant had any authority to cause the plaintiff to be apprehended and committed to prison.

It is an elementary rule in criminal pleading that when the time for prosecuting an offense is limited the indictment must lay the offense within the time limited, or it will be fatally defective, even after verdict. 1 Am. Crim. Law, § 445; State v. G. S., 1 Tyler, 295; State v. Rust, 8 Blackf. 195; People v. Miller, 12 Cal. 291; People v. Gregory, 30 Mich. 371.

In this case the complaint showed on its face that the statute had run on the offense charged, and thus the defendant had notice that it was "void and of no effect." He had no authority to issue a warrant on such complaint; and the fact that it was made to appear to him at the time the complaint was exhibited that the larceny had not been discovered till then makes no difference, as the statute began to run from the commission of the offense, not from its discovery. There was no complaint in law. It is the same as though there had been none in fact. He had no jurisdiction of the process,

and jurisdiction of the process is as essential as jurisdiction of the person and the subject-matter.

In Morgan v. Hughes, 2 T. R. 225, it is said that when a person is committed to prison by the warrant of a justice without accusation some one is guilty of false imprisonment, and that it must be the imprisonment of the justice, who is the immediate and not the remote cause of it. In this State the law makes the same presumption in favor of the jurisdiction of justices that it does in favor of the jurisdiction of superior courts of general jurisdiction. Wright v. Hazen and Gordon, 24 Vt. 143. But presumptions are indulged in only to supply the absence of evidence or averment respecting the facts presumed. They have no place for consideration when the evidence is disclosed or the averment is made.

When therefore the record states the evidence, or contains an averment with reference to a jurisdictional fact, it will be taken to speak the truth on that point, and it will not be presumed that there was other or different evidence respecting the fact, nor that the fact was otherwise than as averred. Galpin v. Page, 18 Wall. 350; Wade v. Hancock, 14 Reporter, 672; Freem. Judg., § 125. Hence it cannot be presumed that the allegation of time in this complaint was a mistake, and that the evidence may have shown that the offense was in fact committed within the time limited. The case must stand on the presumption and ground that the offense was in fact committed more than six years before the complaint was exhibited. It does not stand as it would had the complaint laid the offense within the time limited, but the evidence had shown it without the time. Magistrates of neither superior nor inferior courts are answerable for a want of jurisdiction arising from a mistake of fact that they had no means of discovering nor correcting, nor when they would have had authority to act had the facts been as alleged by the party. Lowthor v. Earl of Radnor, 8 East, 113; Pike v. Carter, 3 Bing. 78; 1 Smith Lead. Cas. 1135. * * *

In Carleton v. Taylor, 50 Vt. 220, it is said to be a well-settled rule of law that when the court had no jurisdiction of the process it is nugatory and void, and that all persons acting under it are without protection; that if under our statute exempting from arrest in suits on contracts, the process issues against one not of the class named, or without compliance with the prescribed condition, it issues without warrant of law, and the court has no jurisdiction of the process.

In Morrill v. Thurston, 46 Vt. 732, a justice was held liable where the plaintiff was committed on a warrant issued to bail in a recognizance for an appeal in a liquor prosecution, the recognizance not being one authorizing a surrender of the principal in discharge of bail. That was a stronger case for the defendant than this, for there the facts may fairly be said to have given the defendant colorable jurisdiction, and to have called upon him to decide whether he had jurisdiction and authority to act or not; while here the facts presented had no color or legal value, and the defendant's action in the premises was but the commission of an official wrong.

Whatever the decisions elsewhere have been on the subject—and they are not uniform—we deem it impossible to sustain this plea without overruling several decisions of this court that have long been recognized and practiced upon as the settled law of the State.

Judgment affirmed, cause remanded, and repleader awarded on the usual terms.

POWERS and VEAZEY, JJ. dissent.

CHURCH v. PEARNE.

(75 Conn. 350; 53 At. 955.—1903.)

Action for false imprisonment, brought to the superior court for Middlesex county. The defendants answered, justifying, one as a justice of the peace and the other as a deputy sheriff, under a sentence of the plaintiff by the former to imprisonment for a contempt of court. A demurrer to the material part of this defense was overruled. The plaintiff then replied, and the reply was held insufficient on demurrer. Issues of fact were then joined by an amended reply, and found for the defendants, on which judgment was rendered in their favor.

BALDWIN, J. * * * The record indicates that the justice of the peace considered that it was incumbent on the plaintiff to go forward, and purge himself of the contempt charged. No such duty rested upon him unless it was legally charged, and no acts not within the personal knowledge of the magistrate holding the court could be legally charged unless by some form of written accusation. The warrant by virtue of which the plaintiff was arrested recited the

same charges which are set forth in the judgment. Not only, however, was it supported by no complaint or affidavit, but it contained no direction to read or give a copy of it to the plaintiff; and the officer's return upon it states simply the arrest.

Our constitution provides that no warrant to seize any person shall issue without probable cause, supported by oath or affirmation; that in all criminal prosecutions the accused shall have the right to be confronted by the witnesses against him, and shall not be deprived of liberty but by due course of law; and that no person shall be arrested, detained, or punished, except in cases clearly warranted by law. Article 1, §§ 8–10. Our statute (Gen. St. 1902, § 506) that "any court may punish by fine and imprisonment any person who shall, in its presence, behave contemptuously or in a disorderly manner; but no justice of the peace shall inflict a greater fine than seven dollars, nor a longer term of imprisonment than thirty days," relates only to acts of contempt committed in the presence of the court, and leaves all others to be dealt with according to the course of the common law. Huntington v. McMahon, 48 Conn. 174, 196. It necessarily implies that a justice of the peace has power to deal with such acts committed in his presence while holding court. In such case he can proceed without any preliminary complaint or warrant, for the offender is already before him, and the facts constituting the offense are within his knowledge. Middlebrook v. State, 43 Conn. 257, 268, 21 Am. Rep. 650. But if he have power to punish for acts not committed in his presence,—a point which we do not decide,—it can only be when he proceeds in due course of law; that is, upon written charges, of which the party accused has had reasonable notice. Tracy v. Williams, 4 Conn. 107, 113, 10 Am. Dec. 102; Welch v. Barber, 52 Conn. 147, 156, 52 Am. Rep. 567. The absence of such charges preferred on oath or affirmation went to the jurisdiction of the court.

Assuming that there was jurisdiction over the subject-matter, and a right to issue a warrant for the plaintiff's arrest, there was no jurisdiction of the cause—that is, of the proceedings for contempt—for want of an essential prerequisite, namely, probable cause, shown by oath or affirmation, before the issue of the warrant. Grumon v. Raymond, 1 Conn. 40, 47, 6 Am. Dec. 200; Allen v. Gray, 11 Conn. 95, 102. This violation of the constitutional rights of the defendant deprived the warrant of the character of legal process. His appearance before the justice court was no waiver of

his rights, for it was compelled by force. He was a stranger to the cause then on trial. There having been no legal process to bring him under the jurisdiction of the court, and no voluntary submission to it, the proceedings resulting in the sentence of committal were *coram non judice*.[1]

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§ 3A.—HARMS BY QUASI JUDICIAL OFFICERS.

WASSON v. MITCHELL.

(18 Ia. 153.—1864.)

DEMURRER to petition. The defendants constituted the board of supervisors of Polk county in 1861. The petition alleges that, as such board, the defendants, at their regular meeting in January, 1861, "carelessly and negligently required, accepted and approved the official bond of one H. H. Helton as constable for the township of Des Moines, in Polk county, given for the year 1861, said bond not being such as was reasonable and necessary for the faithful discharge by the said Helton of his official duties, nor such as was required by law, for that the said bond did not have any sureties thereon, the names of 'A. N. Marsh' and 'C. C. Van' having been forged thereto, they never having signed the said bond or authorized their names to be placed thereon." "That the said A. N. Marsh was notoriously insolvent at the time, and known to be so by the defendants." The petitioner then alleges his injury in this: that Helton collected money for him on execution, converted the same to his own use and died insolvent; that Marsh has absconded, and that in an action by the plaintiff against said C. C. Van on said bond, the latter was adjudged not liable thereon, because his name had been forged thereto. The defendants demurred to the petition because they were not personally liable for acts done in their official capacity; that no cause of action was stated against them, etc. Demurrer sustained, and the plaintiff appeals.

DILLON, J. The allegations of the petition are not as precise and clear as they ought to be, when questioned by demurrer. Upon

[1] Judgment was reversed because of the erroneous admission of evidence.

a fair construction, the petition may be taken to allege, in substance, that the names of both sureties on the official bond of Helton, as constable, were forged, and that the defendants approved of it, carelessly and negligently, that is, the defendants would have known of the forgery, had it not been for their neglect or want of care. And it is also alleged, that one of the persons whose names appeared on the bond as surety was notoriously insolvent, and known to be so by the defendants, when they approved the bond. Upon the assumption that this is the true construction of the petition, we place our decision.

The statute is imperative in requiring that the official bond of a constable "shall be given with at least two sureties," and in requiring that these sureties shall be freeholders. (Rev. §§ 558, 592.) "The surety in every bond," it is further provided, "must be a resident of the State, worth double the sum to be secured beyond the amount of his debts, and have property liable to execution in this State equal to the sum to be secured. Where there are two or more sureties in the same bond, they must, in the aggregate, have the qualifications prescribed in this section." (Rev. § 4126.) Constables must give bonds in the penal sum, to be fixed by the board of supervisors, by an order of record. (Rev. § 557.) This board has power to require constables "to give such bonds and additional bonds as shall be reasonable or necessary for the faithful performance of their several duties;" and may remove any county officer who neglects or refuses to give such bond. (Rev. § 312, cl. 10.) And the board are charged by law with the duty of approving the bonds of constables. (Rev. § 560.) These various provisions evince the care and solicitude of the legislature to protect the public by requiring ample and sufficient bonds from public officers. How useless these provisions, and how unavailing these intended safeguards, if the approving board or officer could, under no circumstances and in no possible event, be held liable for omission or neglect of duty.

As to the general rules of the law, there is no great dispute. Thus, a judicial officer is not liable civilly for judicial acts, unless it may be (a point on which the authorities are not in accord) where he acts willfully, maliciously or corruptly. (Several authorities cited.) And these authorities show that this exemption from civil responsibility extends to all public officers who are charged with deciding upon matters of a *quasi* judicial nature; and we have

no doubt that it extends, in general, to a body, such as the board of supervisors, under our statute. The ground of this exemption is that the public good can best be secured by allowing officers charged with the duty of deciding upon the rights of others "to act upon their own free, unbiased convictions, uninfluenced by any apprehensions."

On the other hand, the rule is equally well settled, that, for the misfeasance or nonfeasance of a ministerial officer, the party injured may have redress by civil action. This broad distinction between judicial and ministerial acts, however plain in theory, is, in many cases, very difficult of application. Thus, is the act of approving of a bond judicial or ministerial? The only way to reconcile the cases is to hold that it may be either; depending, perhaps, upon the general nature of the duties of approving officer. For example, it is "a well-settled rule of American law and practice, that an action lies against a sheriff for taking insufficient bail." (2 Hilld. on Torts, 276, § 4, and cases cited.) But it is held that a justice of the peace is not liable who acts in good faith for misdeciding that a married woman is competent to contract and sign a bond as surety (Howe v. Mason, 14 Iowa, 510), or for error of judgment; there being no intentional fault in taking a recognizance to prosecute an appeal in a form not authorized by law, and therefore, invalid—the proper form having been rendered by the course of legislation, a difficult and perplexing question. (Chickering v. Robinson, 3 Cush. 543.)

We would not hold the board of supervisors to be absolute guarantors of the genuineness of the signatures to official bonds. They may, in the course of business, refer such matters to a committee, to examine and report. It is only necessary that they or their committee shall act in good faith, and with reasonable care and prudence. If, in the fair exercise of their judgment, they are of the opinion that the sureties on a bond are solvent, they are not civilly liable if they should be mistaken; but would be thus liable if they approved a bond whose sureties were known to them to be worthless. So they would have no right to approve a bond without any sureties whatever. Such an act, knowingly, or carelessly done, could not be regarded as a judicial act, in such a sense as to exempt them from civil liabilities to any person thereby injured. (Smith v. Trawl, 1 Root (Conn.) 165; with which Phelps v. Sill, 1 Day, is not inconsistent.) Without extending our remarks, we may ob-

serve that this court has given the subject much consideration; and we believe this to be the true rule, viz.: exempting the board of supervisors, in the approval of bonds, from honest mistake and errors of judgment, whether of law or fact, but holding them at the same time personally liable for negligence, carelessness and official misconduct such as are alleged in the petition. This rule is the only one which will protect the public, and at the same time occasion no interest or embarrassment of which a conscientious and faithful public officer will or can justly complain. If the plaintiff can establish the allegations of his petition, we are of the opinion that he ought to recover; wherefore the judgment of the District Court sustaining the demurrer thereto is

Reversed.[1]

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§ 4.—ACTS OF STATE.

FORD v. SURGET.

(97 U. S. 594.—1878.)

Mr. Justice HARLAN delivered the opinion of the court.

In the complaint filed by Ford against Surget in the Circuit Court of Adams county, Mississippi, on the 2d October, 1866, it is charged that the plaintiff, "at his plantation in said county, on the 5th day of May, in the year 1862, was possessed, as of his own personal property, of 200 bales of cotton, averaging in weight 400 pounds per bale, and of the value of $600 per bale; and being so possessed, the said defendant, at the place aforesaid, and upon the day and year aforesaid, did willfully and utterly and against the consent and will of said plaintiff, destroy by fire the said 200 bales of cotton," to the plaintiff's damage in the sum of $120,000.

The defendant pleaded not guilty, and also filed numerous special pleas. The defense, although presented by the special pleas in

[1] In Weaver v. Devendorf, 3 Den. (N. Y.) 117 (1846), and Stearns v. Mills, 25 Vt. 20 (1852), the quasi-judicial officer is accorded the same exemption from tort liability as is vouchsafed to the judges. In People *ex rel.* Stapleton v. Bell *et al.* 119 N. Y. 175, 41 A. L. J. 307 (1890); and in People *ex rel.* Sherwood v. Board of Canvassers, 129 N. Y. 360, 29 N. E. 358, (1891); and in People *ex rel.* Derby v. Rice, 129 N. Y. 461, 29 N. E. 345, (1891), election officers are declared to possess only ministerial functions.

different forms, is, in substance, embraced by the following allegations, viz.:

That, at and before the time the alleged trespasses were committed, the people of Mississippi, and of Virginia, North Carolina, South Carolina, Florida, Georgia, Alabama, Louisiana, Arkansas and Texas had confederated together for revolt against, and, within their territorial limits, had entirely subverted the government of the United States, and in place thereof, and within and for their territory and people, had created a new and separate government, called the Confederate States of America, having executive, legislative and judicial departments;

That on the 6th March, 1862, and from that date until the time when the alleged trespasses were committed, a war had been and was then waged and prosecuted by and between the United States and the Confederate States, and against each other as belligerent powers and nations; * * * *

That the cotton, in the complaint mentioned, was near the bank of the Mississippi within that county, and was, when burned, likely to fall into the hands of the Federal forces:

That the defendant was then ordered and required by said Farrar, acting as provost marshal under the orders aforesaid, to burn certain cotton, including the cotton in controversy, and, afterward, the defendant, in obedience to the act of the Confederate Congress, and the orders of said military commanders and provost marshal, did burn Ford's cotton, which is the supposed trespass complained of.

To each of the special pleas the plaintiff in error demurred, assigning numerous causes of demurrer, but upon this review we can notice only the ground of demurrer which stated that the defendant, in his pleas, sought to rely " for justification of the trespass committed by him, upon matters in themselves wholly illegal, against peace and good policy, and contrary to the Constitution of the United States, the supreme law of the land, and the government thereof."

The demurrers to the several special pleas were overruled, and the plaintiff filed his similiter and general replications. After trial before a jury, a verdict was returned for the defendant, and judgment therein rendered in his behalf.

Upon error to the Supreme Court of Mississippi, that judgment was affirmed, and from that judgment of affirmance this writ of error is prosecuted. * * * *

We come now to the consideration of the merits of the case, so far as they seem to be involved in the demurrers to the special pleas.

The principles of public law, as applicable to civil and international wars, have been so frequently under discussion here, that we shall not avail ourselves of the opportunity now afforded to renew that discussion or enlarge upon what has been heretofore said. The numerous decisions of this court, beginning with The Prize Cases, in 2 Black, and ending with Williams v. Bruffy and Dewing v. Perdicaries, in 96 U. S., render any further declaration as to those principles wholly unnecessary for the purpose of the present case. Without attempting to restate all the reasons assigned in the adjudged cases, for the conclusions therein announced, we assume that the following propositions are settled by, or plainly to be deduced from, our former decisions.

1. The district of country declared by the constituted authorities, during the late civil war, to be in insurrection against the government of the United States, was enemy territory, and all the people residing within such district were, according to public law, and for all purposes connected with the prosecution of the war, liable to be treated by the United States, pending the war, and while they remained within the lines of the insurrection, as enemies, without reference to their personal sentiments and dispositions.

2. There was no legislation of the Confederate Congress which this court can recognize as having any validity against the United States, or against any of its citizens who, pending the war, resided outside of the defined limits of the insurrectionary districts.

3. The Confederate government can be regarded by the courts in no other light than as simply the military representative of the insurrection against the authority of the United States.

4. To the Confederate army was, however, conceded, in the interest of humanity, and to prevent the cruelties of reprisals and retaliation, such belligerent rights as belonged, under the laws of nations, to the armies of independent governments engaged in war against each other, that concession placing the soldiers and officers of the rebel army, as to all matters directly connected with the mode of prdsecuting the war, "on the footing of those engaged in lawful war," and exempting "them from liability for acts of legitimate warfare."

5. The cotton, for the burning of which damages are claimed in this civil action, was, as to the United States and its military

forces, engaged in the suppression of the rebellion, not only enemy, but hostile property, because being the product of the soil and, when burned, within the boundary of the insurrectionary district, it constituted also, as we know, from the history of the civil war, it did, "the chief reliance of the rebels for means to purchase the munitions of war in Europe." Young v. United States, 96 U. S.; 2 Wall. 418. It was, therefore, liable, at the time, to seizure or destruction by the Federal army, without regard to the individual sentiments of its owner, whether the purpose or effect of such seizure or destruction would have been to strengthen that army, or decrease and cripple the power and resources of the enemy.

It would seem to be a logical deduction from these doctrines—a deduction also demanded by high considerations of humanity and public necessity—that the destruction of the same cotton, under the orders of the rebel military authorities, for the purpose of preventing it from falling into the hands of the Federal army, was, under the circumstances alleged in the special pleas, an act of war upon the part of the military forces of the rebellion, for which the person executing such military orders was relieved from civil responsibility at the suit of the owner voluntarily residing, at the time, within the lines of the insurrection. We do not rest this conclusion upon any authority conferred or attempted to be conferred upon Confederate commanders by the statute of the Confederate Congress, recited in the special pleas. As an act of legislation that statute can have no force whatever in any court recognizing the Federal Constitution as the supreme law of the land. It is to be regarded as nothing more than a declaration upon the part of the military representative of the rebellion, addressed to the rebel commanders, affording evidence to those adhering to the rebellion of the circumstances under which cotton within the lines of the insurrection might be destroyed by military commanders in the service of the Confederate States. It assumed to confer, however, upon such commanders no greater authority than, consistently with the laws and usages of war, they might have exercised, without the previous sanction of the rebel legislative authorities, as to any cotton within their military lines likely to fall into the hands of the Federal forces. They had the right, as an act of war, to destroy private property within the lines of the insurrection, belonging to those who were coöperating, directly or indirectly, in the insurrection against the government of the United States, if such destruction seemed to be necessary for

the purpose of retarding the advance or crippling the military operations of the Federal forces. Of that mode of conducting the war, on behalf of the rebellion, no one could justly complain who occupied the position of an enemy of the United States, by reason of voluntary residence within enemy territory.

But it is insisted with much earnestness that Surget should not be allowed to take shelter under these rules, since it is not averred in the special pleas that he constituted any part of, or held any official relations to, the military forces of the rebellion. But such a technical, narrow construction of the special pleas should not be allowed to prevail in a case like this. It is distinctly alleged that the Confederate government was, at the time of the burning of the cotton, exercising all the functions of civil government within the State of Mississippi, and over its property and inhabitants. It is alleged that the defendant was an inhabitant and citizen of Mississippi, subject to Confederate power, authority and jurisdiction, and that he was ordered and required by the provost marshal, charged by the rebel department commander with the execution of the order to burn the cotton in Adams county likely to fall into the possession of the Federal forces, to burn the cotton on Ford's plantation, and that it was so burned in obedience to the act of the Confederate Congress and the orders of the military authorities. These allegations seem to be sufficiently comprehensive to admit evidence that the defendant acted under duress or compulsion. Taking into consideration the extraordinary circumstances which then surrounded the people of Mississippi, especially the absolute authority which the rebel government and its military commanders were then exercising over that portion of the territory and people of the United States, the special pleas should be deemed, upon demurrer, as sufficiently averring the existence of such relations between Surget and the rebel military authorities as entitled him to make the same defense as a soldier, regularly enlisted in the Confederate army, acting under like orders, could have made. Whether Surget was, in fact, required to execute the order of the provost marshal does not appear. No bill of exceptions was taken, and in view of the explicit averment that Surget was required by military authority to burn Ford's cotton, we cannot assume upon demurrer that he was a mere volunteer to aid in its destruction. * * * *

Our conclusion, therefore, is that the act of the Confederate Congress, recited in the special pleas, was of no validity as an act of

legislation, and while the demurrers could not have been sustained upon the ground that such unauthorized legislation afforded protection to Surget, nevertheless the general facts set out in the special pleas, considered in connection with the belligerent rights conceded to the rebel army by the government of the United States, do constitute a defense to this action, and upon this last ground the demurrer might have been sustained.

We have limited our investigation altogether to the Federal questions raised by the demurrer to the special pleas.

Judgment affirmed.

HEAD v. PORTER.

(48 Fed. R. 481; 45 A. L. J. 205.—1891.)

COLT, J. The plea in this case raises the single question of jurisdiction. The suit was originally brought by William S. Smoot, the complainant's intestate, against James G. Benton, an officer of the United States army, in command of the National armory at Springfield, Mass., charging him with infringement of two patents, dated respectively January 1, 1867, and August 27, 1867, for improvements in cartridge retractors for breech-loading fire-arms. Subsequently the defendant died, and thereupon the complainant moved to amend his bill by substituting the present defendant, Porter, master armorer at the Springfield armory. The amendment was allowed, reserving the right of the defendant to object. The defendant appeared, and without objections filed an answer in the case. The United States attorney, on behalf of Porter, urges this circumstance as tending to show that this suit is in substance, though not in form, against the United States, but I fail to see the force of this argument. The complainant, on the death of Benton, might have proceeded against his representatives, but he chose to sue the present defendant, who consents to be substituted for Benton. The suit therefore stands as if originally brought against Porter.

The defendant admits that since the date of the patents, and before the filing of the bill, he has superintended, and still superintends, the making of breech-loading fire-arms at the Springfield armory, as the master armorer, but he alleges that all his acts in relation thereto

have been done in obedience to specific orders from the secretary of war, and his superior officers, directing the construction thereof, and in no other way; in other words, his defense is that he has acted only as the agent of the government and under its authority. The subject-matter of this suit is a patent issued by the United States, and it became important at the outset to determine the nature of this grant. It has been authoritatively declared by the Supreme Court that the right of a patentee under letters patent was exclusive of the United States, and that it stands on the same footing as other property. James v. Campbell, 104 U. S. 356; Hollister v. Manuf. Co., 113 id. 50. Assuming the allegations of the bill to be true, this is a suit where the property rights of an individual have been invaded by an officer or agent of the United States, acting under its direction, and the question is whether this court has jurisdiction in such a suit.

In cases where this general subject has come before the Supreme Court, the proposition is admitted that the United States, as the sovereign power, cannot be sued without its consent. I need only cite on this point U. S. v. Lee, 106 U. S. 196. But it is not to be inferred from this that this court has not jurisdiction in an action where an officer or agent of the United States is sued for property in his possession as such officer or agent, or for injury to the person or property of another, where the defense is that he acted under the orders of the government.

In Meigs v. M'Clung's Lessee, 9 Cranch, 11, the suit was for land on which the United States had a garrison and had erected a fort. The defendants were military officers in possession, and they insisted that no action could be brought against them because the land was occupied by the United States for the benefit of the United States, and by their direction. The court held that, the title being in the plaintiff, he might sustain his action.

Wilcox v. Jackson, 13 Pet. 498, was a suit against officers of the United States to recover possession of land which had been in the possession of the government for over thirty years. The court do not consider the question whether such an action could be maintained, but proceed to decide the question of the plaintiff's title. * * * *

In the leading case of U. S. v. Lee, 106 U. S. 196, the action was ejectment to recover the possession of lands to which the plaintiff Lee claimed title. The defendants were in possession as officers of

the government. The attorney-general suggested to the court, without making the United States a party, that the property in controversy known as "Arlington Cemetery," had been for more than ten years, and now is, held, occupied and possessed by the government through its officers and agents, who are in the actual possession thereof as public property of the United States. To sustain this defense the court held that it was necessary to show that the defendants were in possession under the United States, by virtue of some valid authority, and the contrary appearing, judgment was awarded to the plaintiff. After reviewing the authorities Mr. Justice MILLER says: "This examination of the cases in this court establishes clearly this result: that the proposition that, when an individual is sued in regard to property which he holds as officer or agent of the United States, his possession cannot be disturbed when that fact is brought to the attention of the court, has been overruled and denied in every case where it has been necessary to decide it, and that in many others where the record shows that the case, as tried below, actually and clearly presented that defense, it was neither urged by counsel nor considered by the court here, though if it had been a good defense it would have avoided the necessity of a long inquiry into plaintiff's title, and of other perplexing questions, and have quickly disposed of the case."

Mr. Justice MILLER then proceeds to discuss certain expressions in the opinion of the court in Carr v. U. S., 98 U. S. 433, and he says: "As these remarks were not necessary to the decision of the point then in question, as the action was equally inconclusive against the United States, whether the persons sued were officers of the government or not, these remarks, if they have the meaning which counsel attribute to them, must rest for their weight as authority on the high character of the judge who delivered them, and not on that of the court which decided the case. That the United States are not bound by a judgment to which they are not parties, and that no officer of the government can, by defending a suit against private persons, conclude the United States by the judgment, was sufficient to decide that case, and was all that was decided."

Looking at the question upon principle he continues: "It seems to be opposed to all the principles upon which the rights of the citizen, when brought in collision with the acts of the government, must be determined. In such cases there is no safety for the citizen except in the protection of the judicial tribunals, for rights which

have been invaded by the officers of the government, professing to act in its name. * * * The position assumed here is that, however clear his rights, no remedy can be afforded to him when it is seen that his opponent is an officer of the United States, claiming to act under its authority, for, as Mr. Chief Justice MARSHALL says, to examine whether this authority is rightfully assumed is the exercise of jurisdiction, and must lead to the decision of the merits of the question. * * * The defense stands here solely upon the absolute immunity from judicial inquiry of every one who asserts authority from the executive branch of the government, however clear it may be made that the executive possessed no such power. Not only no such power is given, but it is absolutely prohibited, both to the executive and the legislative, to deprive any one of life, liberty or property without due process of law, or to take private property without just compensation." * * * *

In Cunningham v. Railroad Co., 109 U. S. 446, this general question was discussed, and the cases in which the court had taken jurisdiction, where the objection was interposed that the suit was substantially against the State, and therefore the State was a necessary party, were examined and classified. The second class of cases is stated by Mr. Justice MILLER as follows: "Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defense is that he has acted under the orders of the government. In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defense he must show that his authority was sufficient in law to protect him. Mitchell v. Harmony, 13 How. 115; Bates v. Clark, 95 U. S. 204; Meigs v. McClung, 9 Cranch, 11; Wilcox v. Jackson, 13 Pet. 498; Brown v. Huger, 21 How. 305; Grisar v. McDowell, 6 Wall, 363; U. S. v. Lee, 106 U. S. 196. * * * *

It cannot be said that the Supreme Court have authoritatively decided the identical question raised in this case, of the right of a patentee to maintain a suit in tort for the infringement of a patent-right against an individual whose defense is that all his acts in relation thereto were done as an officer or agent of the government and in obedience to its orders. * * * *

It is at least doubtful whether the present action could be brought in the Court of Claims. In its present form it is an action in tort,

and not upon any contract, express or implied, and as was said by Mr. Justice BRADLEY in James v. Campbell, the jurisdiction of that court does not extend to torts. While the Supreme Court have declined to pass upon the question of jurisdiction in these cases, they have assumed jurisdiction and disposed of each case on its merits; in other words, no case can be found where the court has dismissed the suit for want of jurisdiction, and this would seem to be sufficient ground in this case to overrule the plea, and allow the case to be heard upon bill, answer and proofs. If however the principle established in the cases we have reviewed, and the rule laid down by Mr. Justice MILLER in Cunningham v. Railroad Co., are sound, it is difficult to see why the court has not jurisdiction in the present case. This is an action of tort for the infringement of a patent, brought against an individual, who is an officer or agent of the United States, and whose defense is that he acted under orders of the government. That this is no defense in actions of this general character has, as we have seen, been repeatedly held by the Supreme Court, and the objection interposed that these suits are substantially against the government, and that therefore it is a necessary party to enable the court to grant relief, has been many times urged without avail. The rights secured to a patentee under his grant from the government are a form of property, in the enjoyment of which he is entitled to protection against all trespassers, including the government. To deprive him of the full enjoyment of these rights by using his invention without his consent is to deprive him of his property without just compensation or due process of law, and therefore in conflict with those provisions of the Constitution which secure this protection to the citizen.

I am of the opinion therefore that the plea in this case should be overruled.[1]

[1] In Belknap v. Schild 161 U. S. 10, 16 Sup. Ct. 443 (1895), the Court said: "But the exemption of the United States from judicial process does not protect their officers and agents, civil or military, in time of peace, from being personally liable to an action of tort by a private person, whose right of property they have wrongfully invaded or injured, even by the authority of the United States;" citing Little v. Barreme, 2 Cranch, (U. S. Sup. Ct.) 169 (1804), and Bates v. Clark, 95 U. S. 204 (1877). At p. 209 of last cited case, Miller, J., says: "Whatever may be the rule in time of war and in the presence of actual hostilities, military officers can no more protect themselves than civilians in time of peace, by orders emanating from a source which is itself without authority."

§ 5.—HARMS UNDER POLICE POWER.

LAWTON v. STEELE.

(152 U. S. 133; 14 Sup. Ct. 499.—1893.)

This was an action at law instituted in the supreme court for the county of Jefferson, by the plaintiffs in error against the defendant in error, together with Edward L. Sargent and Richard U. Sherman, for the conversion of 15 hoop and fyke nets, of the alleged value of $525. Defendants Steele and Sargent interposed a general denial. Defendant Sherman pleaded that he, with three others, constituted the commissioners of fisheries of the state of New York, with power to give directions to game and fish protectors with regard to the enforcement of the game law; that defendant Steele was a game and fish protector duly appointed by the governor of the state of New York; and that the nets sued for were taken possession of by said Steele, as such game and fish protector, upon the ground that they were maintained upon the waters of the state in violation of existing statutes for the protection of fish and game, and thereby became a public nuisance.

The facts were undisputed. The nets were the property of the plaintiffs, and were taken away by the defendant Steele, and destroyed. At the time of the taking, most of the nets were in the waters of the Black River bay, being used for fishing purposes, and the residue were upon the shore of that bay, having recently been used for the same purpose. The plaintiffs were fishermen, and the defendant Steele was a state game and fish protector. The taking and destruction of the nets were claimed to have been justifiable under the statutes of the state relating to the protection of game and fish. Plaintiffs claimed there was no justification under the statutes, and, if they constituted such justification upon their face, they were unconstitutional. Defendant Sherman was a state fish commissioner. Defendant Sargent was president of the Jefferson County Fish & Game Association. Plaintiffs claimed these defendants to be liable upon the ground that they instigated, incited, or directed the taking and destruction of the nets.

Upon trial before a jury a verdict was rendered, subject to the opinion of the court, in favor of the plaintiffs against defendant Steele for the sum of $216, and in favor of defendants Sargent and Sherman. A motion for a new trial was denied, and judgment

entered upon the verdict for $216 damages and $166.09 costs. On appeal to the general term this judgment was reversed, and a new trial ordered, and a further appeal allowed to the court of appeals. On appeal to the court of appeals the order of the general term granting a new trial was affirmed, and judgment absolute ordered for the defendant. 119 N. Y. 226, 23 N. E. 878. Plaintiffs thereupon sued out a writ of error from this court.

Mr. Justice BROWN. This case involves the constitutionality of an act of the legislature of the state of New York known as chapter 591, Laws N. Y. 1880, as amended by chapter 317, Laws N. Y. 1883, entitled "An act for the appointment of game and fish protectors."

By a subsequent act enacted in 1886:

"Section 1. No person shall at any time kill or take from the waters of Henderson bay or Lake Ontario, within one mile from the shore, between the most westerly point of Pillar Point and the boundary line between the counties of Jefferson and Oswego, * * * any fish of any kind by any device or means whatever otherwise than by hook and line or rod held in hand. But this section shall not apply to or prohibit the catching of minnows for bait, providing the person using nets for that purpose shall not set them, and shall throw back any trout, bass, or any other game fish taken, and keep only chubs, dace, suckers, or shiners.

"Sec. 2. Any person violating any of the provisions of this act shall be guilty of a misdemeanor, and liable to a penalty of $50 for each offense." Laws 1886, c. 141.

By the act of 1880, as amended by the act of 1883:

"Sec. 2. Any net pound, or other means or device for taking or capturing fish, or whereby they may be taken or captured, set, put, floated, had, found, or maintained in or upon any of the waters of this state, or upon the shores of or islands in any of the waters of this state, in violation of any existing or hereafter enacted statutes or laws for the protection of fish, is hereby declared to be and is a public nuisance, and may be abated and summarily destroyed by any person, and it shall be the duty of each and every protector aforesaid and of every game constable to seize and remove and forthwith destroy the same, * * * and no action for damages shall lie or be maintained against any person for or on account of any such seizure and destruction."

This last section was alleged to be unconstitutional and void for

three reasons: (1) As depriving the citizen of his property without due process of law; (2) as being in restraint of the liberty of the citizen; (3) as being an interference with the admiralty and maritime jurisdiction of the United States.

The trial court ruled the first of the above propositions in plaintiffs' favor, and the others against them, and judgment was thereupon entered in favor of the plaintiffs.

The constitutionality of the section in question was, however, sustained by the general term and by the court of appeals, upon the ground of its being a lawful exercise of the police power of the state.

The extent and limits of what is known as the "police power" have been a fruitful subject of discussion in the appellate courts of nearly every state in the Union. It is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance Under this power it has been held that the state may order the destruction of a house falling to decay, or otherwise endangering the lives of passers-by; the demolition of such as are in the path of a conflagration; the slaughter of diseased cattle; the destruction of decayed or unwholesome food; the prohibition of wooden buildings in cities; the regulation of railways and other means of public conveyance, and of interments in burial grounds; the restriction of objectionable trades to certain localities; the compulsory vaccination of children; the confinement of the insane or those afflicted with contagious diseases; the restraint of vagrants, beggars, and habitual drunkards; the suppression of obscene publications and houses of ill fame; and the prohibition of gambling houses and places where intoxicating liquors are sold. Beyond this, however, the state may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. 357; Kidd v. Pearson, 128 U. S. 1, 9 Sup. Ct. 6.

To justify the State in thus interposing its authority in behalf of the public, it must appear—First, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly

oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations; in other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts. Thus, an act requiring the master of a vessel arriving from a foreign port to report the name, birthplace, and occupation of every passenger, and the owner of such vessel to give a bond for every passenger so reported, conditioned to indemnify the State against any expense for the support of the persons named for four years thereafter, was held by this court to be indefensible as an exercise of the police power, and to be void as interfering with the right of congress to regulate commerce with foreign nations. Henderson v. Mayor, 92 U. S. 259.

A similar statute of California, requiring a bond for certain classes of passengers described, among which were "lewd and debauched women," was also held to show very clearly that the purpose was to extort money from a large class of passengers, or to prevent their immigration to California altogether, and was held to invade the right of congress. Chy Lung v. Freeman, 92 U. S. 275. So, in Railroad Co. v. Husen, 95 U. S. 465, a statute of Missouri which prohibited the driving of Texas, Mexican, or Indian cattle into the State between certain dates in each year was held to be in conflict with the commerce clause of the constitution, and not a legitimate exercise of the police powers of the State, though it was admitted that the State might, for its self-protection, prevent persons or animals having contagious diseases from entering its territory. In Rockwell v. Nearing, 35 N. Y. 302, an act of the legislature of New York which authorized the seizure and sale, without judicial process, of all animals found trespassing within private inclosures, was held to be obnoxious to the constitutional provision that no person should be deprived of his property without due process of law. See, also, Austin v. Murray, 16 Pick. 121; Watertown v. Mayo, 109 Mass. 315; Slaughterhouse Cases, 16 Wall. 36; In re Cheesebrough, 78 N. Y. 232; Brown v. Perkins, 12 Gray, 89. In all these cases the acts were held to be invalid as involving an unnecessary invasion of the rights of property, and a practical inhibition of certain occupations harmless in themselves,

and which might be carried on without detriment to the public interests.

The preservation of game and fish, however, has always been treated as within the proper domain of the police power, and laws limiting the season within which birds and wild animals may be killed or exposed for sale, and prescribing the time and manner in which fish may be caught, have been repeatedly upheld by the courts. Thus, in Smith v. Maryland, 18 How. 71, it was held that the State had a right to protect its fisheries in Chesapeake Bay by making it unlawful to take or capture oysters with a scoop or drag, and to inflict the penalty of forfeiture upon the vessel employed in this pursuit. The avowed object of the act was to prevent the destruction of the oysters by the use of particular instruments in taking them. "It does not touch," said the court, "the subject of the common liberty of taking oysters, save for the purpose of guarding it from injury, to whom it may belong, and by whomsoever it may be enjoyed." It was held that the right of forfeiture existed, even though the vessel was enrolled for the coasting trade under the act of congress. So, in Smith v. Levinus, 8 N. Y. 472, a similar act was held to be valid, although it vested certain legislative powers in boards of supervisors, authorizing them to make laws for the protection of shell and other fish. In State v. Roberts, 59 N. H. 256, which was an indictment for taking fish out of navigable waters out of the season prescribed by statute, it was said by the court: "At common law the right of fishing in navigable waters was common to all. The taking and selling of certain kinds of fish and game at certain seasons of the year tended to the destruction of the privilege or right by the destruction consequent upon the unrestrained exercise of the right. This is regarded as injurious to the community, and therefore it is within the authority of the legislature to impose restriction and limitation upon the time and manner of taking fish and game considered valuable as articles of food or merchandise. For this purpose, fish and game laws are enacted. The power to enact such laws has long been exercised, and so beneficially for the public that it ought not now to be called into question." Com. v. Chapin, 5 Pick. 199; McCready v. Virginia, 94 U. S. 391; Vinton v. Welsh, 9 Pick. 92; Com. v. Essex Co., 13 Gray, 248; Phelps v. Racey, 60 N. Y. 10; Holyoke Co. v. Lyman, 15 Wall. 500; Gentile v. State, 29 Ind. 409; State v. Lewis, (Ind. Sup.) 33 N. E. 1024.

As the waters referred to in the act are unquestionably within the jurisdiction of the State of New York, there can be no valid objection to a law regulating the manner in which fishing in these waters shall be carried on. Hooker v. Cummings, 20 Johns. 91. The duty of preserving the fisheries of a State from extinction by prohibiting exhaustive methods of fishing, or the use of such destructive instruments as are likely to result in the extermination of the young as well as the mature fish, is as clear as its power to secure to its citizens, as far as possible, a supply of any other wholesome food.

The main, and only real, difficulty connected with the act in question, is in its declaration that any net, etc., maintained in violation of any law for the protection of fisheries is to be treated as a public nuisance, "and may be abated and summarily destroyed by any person; and it shall be the duty of each and every protector aforesaid and every game constable, to seize, remove, and forthwith destroy the same." The legislature, however, undoubtedly possessed the power, not only to prohibit fishing by nets in these waters, but to make it a criminal offense, and to take such measures as were reasonable and necessary to prevent such offenses in the future. It certainly could not do this more effectually than by destroying the means of the offense. If the nets were being used in a manner detrimental to the interests of the public, we think it was within the power of the legislature to declare them to be nuisances, and to authorize the officers of the State to abate them. Hart v. Mayor, 9 Wend. 571; Meeker v. Van Rensselaer, 15 Wend. 397.

An act of the legislature which has for its object the preservation of the public interests against the illegal depredations of private individuals ought to be sustained, unless it is plainly violative of the constitution or subversive of private rights. In this case there can be no doubt of the right of the legislature to authorize judicial proceedings to be taken for the condemnation of the nets in question, and their sale or destruction by process of law. Congress has assumed this power in a large number of cases, by authorizing the condemnation of property which has been made use of for the purpose of defrauding the revenue. Examples of this are vessels illegally registered or owned, or employed in smuggling or other illegal traffic; distilleries or breweries illegally carried on or operated; and buildings standing upon or near the boundary line between the United States and another country, and used as depots for

smuggling goods. In all these cases, however, the forfeiture was decreed by judicial proceeding. But where the property is of little value, and its use for the illegal purpose is clear, the legislature may declare it to be a nuisance, and subject to summary abatement. Instances of this are the power to kill diseased cattle; to pull down houses in the path of conflagrations; the destruction of decayed fruit or fish or unwholesome meats, of infected clothing, obscene books or pictures, or instruments which can only be used for illegal purposes. While the legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so, a good deal must be left to its discretion in that regard; and, if the object to be accomplished is conductive to the public interests, it may exercise a large liberty of choice in the means employed. Railway Co. v. Hunt, 50 N. J. Law, 308, 12 Atl. 697; Blazier v. Miller, 10 Hun, 435; Mouse's Case, 12 Coke, 63; Stone v. Mayor, 25 Wend. 173; Print Works v. Lawrence 21 N. J. Law, 248, 23 N. J. Law, 590.

It is not easy to draw the line between cases where property illegally used may be destroyed summarily and where judicial proceedings are necessary for its condemnation. If the property were of great value, as, for instance, if it were a vessel employed for smuggling or other illegal purposes, it would be putting a dangerous power in the hands of a custom officer to permit him to sell or destroy it as a public nuisance, and the owner would have good reason to complain of such act as depriving him of his property without due process of law. But where the property is of trifling value, and its destruction is necessary to effect the object of a certain statute, we think it is within the power of the legislature to order its summary abatement. For instance, if the legislature should prohibit the killing of fish by explosive shells, and should order the cartridges so used to be destroyed, it would seem like belittling the dignity of the judiciary to require such destruction to be preceded by a solemn condemnation in a court of justice. The same remark might be made of the cards, chips, and dice of a gambling room.

The value of the nets in question was but $15 apiece. The cost of condemning one (and the use of one is as illegal as the use of a dozen) by judicial proceedings would largely exceed the value of the net, and doubtless the State would, in many cases, be deterred from executing the law by the expense. They could only be removed from the water with difficulty, and were liable to injury

in the process of removal. The object of the law is undoubtedly a beneficent one, and the State ought not to be hampered in its enforcement by the application of constitutional provisions which are intended for the protection of substantial rights of property. It is evident that the efficacy of this statute would be very seriously impaired by requiring every net illegally used to be carefully taken from the water, carried before a court or magistrate, notice of the seizure to be given by publication, and regular judicial proceedings to be instituted for its condemnation.

There is not a State in the Union which has not a constitutional provision entitling persons charged with crime to a trial by jury, and yet from time immemorial the practice has been to try persons charged with petty offenses before a police magistrate, who not only passes upon the question of guilt, but metes out the proper punishment. This has never been treated as an infraction of the constitution, though technically a person may in this way be deprived of his liberty without the intervention of a jury. Callan v. Wilson, 127 U. S. 540, 8 Sup. Ct. 1301, and cases cited. So, the summary abatement of nuisances without judicial process or proceeding was well known to the common law long prior to the adoption of the constitution, and it has never been supposed that the constitutional provision in question in this case was intended to interfere with the established principles in that regard.

Nor is a person whose property is seized under the act in question without his legal remedy. If, in fact, his property has been used in violation of the act, he has no just reason to complain; if not, he may replevy his nets from the officer seizing them, or, if they have been destroyed, may have his action for their value. In such cases the burden would be upon the defendant to prove a justification under the statute. As was said by the supreme court of New Jersey in a similar case, (Print Works v. Lawrence, 21 N. J. Law, 248, 259:) "The party is not, in point of fact, deprived of a trial by jury. The evidence necessary to sustain the defense is changed. Even if the party were deprived of a trial by jury, the statute is not, therefore, necessarily unconstitutional." Indeed, it is scarcely possible that any actual injustice could be done in the practical administration of the act.

It is said, however, that the nets are not in themselves a nuisance, but are perfectly lawful acts of manufacture, and are ordinarily used for a lawful purpose. This is, however, by no means a con-

clusive answer. Many articles—such, for instance, as cards, dice, and other articles used for gambling purposes—are perfectly harmless in themselves, but may become nuisances by being put to an illegal use, and in such cases fall within the ban of the law, and may be summarily destroyed. It is true that this rule does not always follow from the illegal use of a harmless article. A house may not be torn down because it is put to an illegal use, since it may be as readily used for a lawful purpose (Ely v. Supervisors, 36 N. Y. 297); but, where minor articles of personal property are devoted to such use, the fact that they may be used for a lawful purpose would not deprive the legislature of the power to destroy them. The power of the legislature to declare that which is perfectly innocent in itself to be unlawful is beyond question (People v. West, 106 N. Y. 293, 12 N. E. 610); and in such case the legislature may annex to the prohibited act all the incidents of a criminal offense, including the destruction of property denounced by it as a public nuisance.

In Weller v. Snover, 42 N. J. Law, 341, it was held that a fish warden for a county, appointed by the governor, had the right, under an act of the legislature, to enter upon land and destroy a fish basket constructed in violation of the statute, together with the materials of which it was composed, so that it might not again be used. It was stated in that case that, "after a statute has declared an invasion of a public right to be a nuisance, it may be abated by the destruction of the object used to effect it. The person who, with actual or constructive notice of the law, sets up such nuisance, cannot sue the officer whose duty it has been made, by the statute, to execute its provisions." So, in Williams v. Blackwall, 2 Hurl. & C. 33, the right to take possession of or destroy any engine placed or used for catching salmon in contravention of law was held to extend to all persons, and was not limited to conservators or officers appointed under the act.

It is true there are several cases of a contrary purport. Some of these cases, however, may be explained upon the ground that the property seized was of considerable value. Ieck v. Anderson, 57 Cal. 251, boats as well as nets; Dunn v. Burleigh, 62 Me. 24, teams and supplies in lumbering; King v. Hayes, 80 Me. 206, 13 Atl. 882, a horse. In others the court seems to have taken a more technical view of the law than the necessities of the case or an adequate protection of the owner required. Lowry v. Rainwater,

70 Mo. 152; State v. Robbins, 124 Ind. 308, 24 N. E. 978; Ridgeway v. West, 60 Ind. 371.

Upon the whole, we agree with the court of appeals in holding this act to be constitutional, and the judgment of the supreme court is therefore affirmed.

Mr. Chief Justice FULLER, dissenting. In my opinion the legislation in question, so far as it authorizes the summary destruction of fishing nets and prohibits any action for damages on account of such destruction, is unconstitutional.

Fishing nets are in themselves articles of property entitled to the protection of the law, and I am unwilling to concede to the legislature of a State the power to declare them public nuisances, even when put to use in a manner forbidden by statute, and on that ground to justify their abatement by seizure and destruction without process, notice, or the observance of any judicial form.

The police power rests upon necessity and the right of self-protection, but private property cannot be arbitrarily invaded under the mere guise of police regulation, nor forfeited for the alleged violation of law by its owner, nor destroyed by way of penalty inflicted upon him, without opportunity to be heard.

It is not doubted that the abatement of a nuisance must be limited to the necessity of the occasion, and, as the illegal use of fishing nets would be terminated by their withdrawal from the water and the public be fully protected by their detention, the lack of necessity for the arbitrary proceedings prescribed seems to me too obvious to be ignored. Nor do I perceive that the difficulty which may attend their removal, the liability to injury in the process, and their comparatively small value ordinarily, affect the principle, or tend to show their summary destruction to be reasonably essential to the suppression of the illegal use. Indeed, I think that that argument is to be deprecated as weakening the importance of the preservation, without impairment in ever so slight a degree, of constitutional guaranties.

I am, therefore, constrained to withhold my assent to the judgment just announced, and am authorized to say that Mr. Justice FIELD and Mr. Justice BREWER concur in this dissent.

LOESCH v. KOEHLER.

(144 Ind. 278; 41 N. E. 326.—1895.)

HACKNEY, J. Action and recovery by the appellee against the appellants for causing the death of two of his horses. * * *

The appellants sought to justify the killing by the provisions of section 334, Elliott's Supp. (section 2202, Rev. St. 1894), which are as follows: "Any sheriff, constable, marshal, policeman or agent of any society for the prevention of cruelty to animals, may kill or cause to be killed any animal found neglected or abandoned and which, in the opinion of three reputable citizens, is injured or diseased past recovery, or, by age, has become useless." The court instructed the jury that the justification was not complete unless it was shown that the appellee had notice of the "seizure and the investigation," and unless "said horses were, in truth and in fact, so diseased or injured as to be past recovery, or, by reason of age, were useless." The evidence showed that the horses were in charge of a youth who was engaged in hauling brick with them for the appellee; that the appellants were officers and agents of the Ft. Wayne Humane Society for the Prevention of Cruelty to Animals and Children, and that the appellants, without notice to the appellee, procured the opinion of three reputable citizens that said horses had been neglected and abused, and were injured and diseased past recovery, and had, because of their age, become useless; that, with no malice, and acting upon such opinion, they caused said animals to be killed. As to whether said horses had been injured or diseased beyond recovery, or were, by age, useless, the evidence was in conflict; and we may assume that, if this was a proper issue, the jury found the weight of the evidence in favor of the appellee. * * * By the fundamental law it is provided that no person shall be deprived of his property without due process of law. Does the statute under consideration violate this guaranty to the citizen?

The confiscation and destruction of the animals cannot be justified as a penalty for the violation of the law against cruelty to animals, as under the statutes of some States where it is provided that, as a part of the penalty, the property employed in an unlawful trade, an illegal act, may be seized and destroyed. Such statutes are those authorizing the destruction of gambling devices, intoxicating liquors,

fish nets, traps, etc. In that class of cases it is not only a part of the prescribed penalty, but it is held to be a necessary element of, and to rest upon, a judgment of guilt and of forfeiture. Hey Sing Ieck v. Anderson, 57 Cal. 251; Lowry v. Rainwater, 70 Mo. 152; Greene v. James, 2 Curt. 187, Fed. Cas. No. 5,766; State v. Robbins, 124 Ind. 308, 24 N. E. 978. See, also, State v. Miller, 48 Me. 576; State v. Snow, 3 R. I. 64; Weller v. Snover, 42 N. J. Law, 341. Though the police power may uphold statutes of that nature, the statute before us does not rest upon the exercise of that power. It does not extend the right as an element of punishment to the owner of the animals killed, and wholly omits the essential element of notice, included in the class of cases to which we have referred. Nor can it be maintained that, as an exercise of the police power, it is a method of quarantine, since it does not make the destruction depend upon the existence of infectious or contagious disease, or other condition affecting public health or comfort. The forfeiture and destruction authorized by the statute is not a part of the penalty for the offense of cruelly using the animals. It is permitted simply because the animals may be injured or diseased past recovery, or, from age, may be useless, and where the owner may have neglected or abandoned them. * * * In Pearson v. Zehr, 138 Ill. 48, 29 N. E. 854, it is held that the slaughter by a live-stock commission of animals supposed to be suffering from contagious disease does not conclude the owner from recovering, if it cannot be shown that such animals actually had such disease, and it was said: "To permit the commissioners to determine, *ex parte*, that some of the horses had the glanders, and that the others had been exposed thereto, and to hold that determination a justification for slaughtering the horses, without imposing upon the appellants the burden of establishing affirmatively the actual existence of such disease and such exposure, would not be a valid exercise of the police power of the State, but would be a palpable violation of the constitutional provision that no person shall be deprived of property without due process of law." A like decision was rendered in Miller v. Horton, 152 Mass. 540, 26 N. E. 100, and it was there held that, in the absence of disease constituting a nuisance, the legislature could not extend the right to slaughter without notice and an opportunity to the owner to be heard.

In holding that the statute is invalid, in permitting the destruction of the property of a citizen without due process of law, we would

not be understood as holding that the question as to the existence of the statutory cause for destruction must be submitted to a court of justice, nor that a notice, such as is required in ordinary civil or criminal proceedings in such courts, is necessary; but some notice, and a hearing before some tribunal, must be provided. The action of the Circuit Court in adding to the terms of the statute, by instructing as to the necessity for notice, it is conceded, could not remedy the omission from the statute. The finding of the jury negatived the existence of notice, and, under the instruction given, presents the question as to the validity of the statute without notice.

The judgment is affirmed.[1]

[1] In Morris v. City of Columbus, 102 Ga. 792, 30 S. E. 850, 66 Am. S. R. 243 (1897), it was held "that the legislature has power to pass an act compelling vaccination, and that it may delegate this authority to a municipal corporation. But, while this is true, municipal corporations must have express authority from the legislature, as no such power will ever arise by implication. In no proper sense can the act of the general assembly attacked in this case be said to deprive the plaintiffs in error of any right without due process of law, or to deny to them the equal protection of the law."

In City of Newton v. Joyce, 166 Mass. 83, 44 N. E. 116 (1896), Lathrop J, said: "This is a bill in equity, brought in the superior court, under St. 1891, c. 220, § 4, to prevent, by injunction, the defendant from using and occupying certain premises in the city of Newton as a stable, for the keeping of more than four horses therein. * * * The defendant contends that the statute of 1891 is unconstitutional, because it deprives him of the use of his property without any provision for compensation, and because it gives no right of appeal from the decision of the board of health on the question of whether or not a license should be granted; but we have no doubt that the statute in question is constitutional. It is an exercise of the police power of the commonwealth, and not of the right of eminent domain; and such an exercise of the police power is constitutional, although no provision is made for compensation to the owner, and no right of appeal is given from the local authorities, to whom the legislature has seen fit to instruct the determination of the question. Com. v. Alger, 7 Cush. 53, 85, 96; Com. v. Colton, 8 Gray, 488; Com. v. Tewksbury, 11 Metc. (Mass.) 55, 57; Watertown v. Mayo, 109 Mass. 315, 318; Bancroft v. Cambridge, 126 Mass. 438, 441; Com. v. Bearse, 132 Mass. 542; Train v. Disinfecting Co., 144 Mass. 523, 530, 11 N. E. 929; Com. v. Roberts, 155 Mass. 281, 29 N. E. 522; White v. Kenney, 157 Mass. 12, 31 N. E. 654; Foster v. Kansas, 112 U. S. 201, 5 Sup. Ct. 8, 97; Mulger v. State of Kansas, 123 U. S. 623, 8 Sup. St. 273.

§ 5A.—LEGALIZING NUISANCES.

SAWYER v. DAVIS.

(136 Mass. 239.—1884.)

Bill to dissolve or modify an injunction obtained by the present defendants restraining the present plaintiffs from ringing a bell on their mill before 6:30 A. M. After the injunction was granted, the legislature passed an act as follows: "Manufacturers and others employing workmen are authorized, for the purpose of giving notice to such employees, to ring bells and use whistles and gongs of such size and weight, in such manner and at such hours as the board of aldermen of cities and the selectmen of towns may in writing designate." Later, the selectmen of Plymouth granted to the plaintiffs a written license to ring the bell on their mill, beginning at 5 A. M., in the same manner as before the injunction. The defendants demurred to the bill, on the ground that the statute was unconstitutional so far as applicable to them.

C. ALLEN, J. Nothing is better established than the power of the legislature to make what are called police regulations, declaring in what manner property shall be used and enjoyed, and business carried on, with a view to the good order and benefit of the community, even although they may to some extent interfere with the full enjoyment of private property, and although no compensation is given to a person so inconvenienced. (Bancroft v. Cambridge, 126 Mass. 438, 441.) In most instances, the illustrations of the proper exercise of this power are found in rules and regulations restraining the use of property by the owner, in such a manner as would cause disturbance and injury to others. But the privilege of continuing in the passive enjoyment of one's own property, in the same manner as formerly, is subject to like limitation; and with the increase of population in a neighborhood, and the advance and development of business, the quiet and seclusion and customary enjoyment of homes are necessarily interfered with until it becomes a question how the right which each person has of prosecuting his lawful business in a reasonable and proper manner shall be made consistent with the other right which each person has to be free

from unreasonable disturbance in the enjoyment of his property. Merrifield v. Worcester, 110 Mass. 216, 219. In this conflict of rights police regulations by the legislature find a proper office in determining how far and under what circumstances the individual must yield with a view to the general good. For example, if, in a neighborhood thickly occupied by dwelling houses, any one, for his own entertainment, or the gratification of a whim, were to cause bells to be rung, and steam-whistles to be blown to the extent that is usual with the bells and steam-whistles of locomotive engines near railroad stations in large cities, there can be no doubt that it would be an infringement of the rights of the residents, for which they could find ample remedy and vindication in the courts. But if the legislature, with a view to the safety of life, provides that bells shall be rung and whistles sounded, under those circumstances, persons living near by must necessarily submit to some annoyance from this source, which otherwise they would have a right to be relieved from.

It is ordinarily a proper subject for legislative discretion to determine by general rules the extent to which those who are engaged in customary and lawful and necessary occupations shall be required or allowed to give signals or warnings by bells or whistles, or otherwise, with a view either to the public safety, as in the case of railroads, or to the necessary or convenient operation and management of their own works; and ordinarily such determination is binding upon the courts, as well as upon citizens generally. And when the legislature directs or allows that to be done which would otherwise be a nuisance, it will be valid, upon the ground that the legislature is ordinarily the proper judge of what the public good requires, unless carried to such an extent that it can fairly be said to be an unwholesome and unreasonable law. Bancroft v. Cambridge, 126 Mass. 441. It is accordingly held in many cases, and is now a well established rule of law, at least in this commonwealth, that the incidental injury which results to the owner of property situated near a railroad, caused by the necessary noise, vibration, dust, and smoke from the passing trains, which would clearly amount to an actionable nuisance if the operation of the railroad were not authorized by the legislature, must, if the running of the trains is so authorized, be borne by the individual, without compensation or remedy in any form. The legislative sanction makes the business lawful, and defines what must be accepted

as a reasonable use of property and exercise of rights on the part of the railroad company, subject always to the qualification that the business must be carried on without negligence or unnecessary disturbance of the rights of others. And the same rule extends to other causes of annoyance which are regulated and sanctioned by law. Presbrey v. Old Colony & Newport Railway, 103 Mass. 1, 6, 7; Walker v. Old Colony & Newport Railway, 103 Mass. 10, 14; Call v. Allen, 1 Allen, 137; Commonwealth v. Rumford Chemical Works, 16 Gray, 231, 233; Struthers v. Dunkirk, Warren & Pittsburgh Railway, 87 Penn. St. 282; Hatch v. Vermont Central Railroad, 28 Vt. 142, 147; Brand v. Hammersmith & City Railway, L. R. 1 Q. B. 130, 2 Q. B. 223, 4 H. L. 171; Vaughan v. Taff Vale Railway, 5 H. & N. 679, 685, 687; Rex v. Pease, 4 B. & Ad. 30; Sedgw. St. & Const. Law, 435, 436.

The recent case of Baltimore & Potomac Railroad v. Fifth Baptist Church, 108 U. S. 317, is strongly relied on by the defendants as an authority in their favor. There are, however, two material and decisive grounds of distinction between that case and this. There the railroad company had only a general legislative authority to construct works necessary and expedient for the proper completion and maintenance of its railroad, under which authority it assumed to build an engine-house and machine-shop close by an existing church, and it was held that it was never intended to grant a license to select that particular place for such works to the nuisance of the church. Moreover, in that case, the disturbance was so great as not only to render the church uncomfortable, but almost unendurable as a place of worship, and it virtually deprived the owners of the use and enjoyment of their property. We do not understand that it was intended to lay down, as a general rule applicable to all cases of comparatively slight though real annoyance, naturally and necessarily resulting in a greater or less degree to all owners of property in the neighborhood from a use of property or a method of carrying on a lawful business which clearly falls within the terms and spirit of a legislative sanction, that such sanction will not affect the claim of such an owner to relief; but rather that the court expressly waived the expression of an opinion upon the point. * * * *

In the case before us, looking at it for the present without regard to the decree of this court in the former case between these parties, we find nothing in the facts set forth which shows that the

statute relied on as authorizing the plaintiffs to ring their bell (St. 1883, c. 84) should be declared unconstitutional. It is virtually a license to manufacturers, and others employing workmen, to carry on their business in a method deemed by the legislature to be convenient, if not necessary, for the purpose of giving notice, by ringing bells, and using whistles and gongs, in such manner and at such times as may be designated in writing by municipal officers. In character, it is not unlike numerous other instances to be found in our statutes, where the legislature has itself fixed, or has authorized municipal or other boards or officers to fix, the places, times, and methods in which occupations may be carried on, or acts done, which would naturally be attended with annoyance to individuals. The example of bells and whistles on locomotive engines has already been mentioned. Reference may also be made to the statutes regulating the use of stationary steam-engines, the places and manner of manufacturing or keeping petroleum, of carrying on other offensive trades and occupations, of storing gunpowder, and of establishing hospitals, stables and bowling alleys.

The defendants, however, contend that a different question arises in the present case, where the plaintiffs rely upon a legislative sanction given to acts after it had been determined by this court that the doing of them was attended with a peculiar injury to the defendants, which entitled them to a remedy as for a nuisance. There can be no doubt that such sanction would be a good defense to an indictment for nuisance; or to a proceeding instituted by an individual, whose only grievance was that he had sustained special damage in consequence of being disturbed in the enjoyment of some public right, such as the right to travel upon a highway or river. His public right may clearly be regulated and controlled by the legislature, after a decision of the court as well as before. Commonwealth v. Essex Co., 13 Gray, 239, 247. But the argument is urged upon us with great force, that in the present case there had been a judicial determination that the ringing of the bell, at the hours now authorized by the terms of the statute and the designation of the selectmen, was a private nuisance to the defendants, not growing out of any public right, and that the statute ought not, as a matter of construction, to be held applicable to this case; or, if such is its necessary construction, that it is unconstitutional, as interfering with their vested rights.

In the first place we can have no doubt that the statute by its

just construction is in its terms applicable to the present case. It is undoubtedly true that neither a general authority nor a particular license is to be so construed as to be held to sanction what was not intended to be sanctioned. A general authority is not necessarily to be treated as a particular license; Commonwealth v. Kidder, 107 Mass. 188; and in some cases, even where a particular license or authority has been given, as to keep an inn, ale house, or slaughter-house in a particular place, which is specified, this authority has not been deemed to sanction the keeping of it in an improper manner. Rex v. Cross, 2 C. & P. 483; Commonwealth v. McDonough, 13 Allen, 581, 584. State v. Mullikin, 8 Blackf. 260; United States v. Elder, 4 Cranch. C. C. 507. And, ordinarily, a statute which authorizes a thing to be done, which can be done without creating a nuisance, will not be deemed to authorize a nuisance. In such cases, it is not to be assumed that it was contemplated by the legislature that what was so authorized would have the necessary effect to create a nuisance, or that it would be done in such a manner as to create a nuisance; and, if a nuisance is created, there will in such cases ordinarily be a remedy at law or in equity. Eames v. New England Worsted Co., 11 Met. 570; Haskell v. New Bedford, 108 Mass. 208, 215; Commonwealth v. Kidder, 107 Mass. 188. But, on the other hand, the authority to do an act must be held to carry with it whatever is naturally incidental to the ordinary and reasonable performance of that act. When the legislature authorized factory bells to be rung, it must have been contemplated that they would be heard in the neighborhood. That is a natural and inevitable consequence. The legislature must be deemed to have determined that the benefit is greater than the injury and annoyance; and to have intended to enact that the public must submit to the disturbance, for the sake of the greater advantage that would result from this method of carrying on the business of manufacturing. It must be considered, therefore, in this case, that a legislative sanction has been given to the very act which this court found to create a private nuisance.

It is then argued that the legislature cannot legalize a nuisance, and cannot take away the rights of the defendants as they have been ascertained and declared by this court; and this is undoubtedly true, so far as such rights have become vested. For example, if the plaintiff under an existing rule of law has a right of action to recover damages, for a past injury suffered by him, his remedy

cannot be cut off by an act of the legislature. So also, if, in a suit in equity to restrain the continuance of a nuisance, damages have been awarded to him, or costs of suit, he would have an undoubted right to recover them, notwithstanding the statute. But, on the other hand, the legislature may define what in the future shall constitute a nuisance, such as will entitle a person injured thereby to a legal or equitable remedy, and may change the existing law rule on the subject. It may declare, for the future, in what manner a man may use his property or carry on a lawful business without being liable to an action in consequence thereof; that is, it may define what shall be a lawful and reasonable mode of conduct. This legislative power is not wholly beyond the control of the courts, because it is restrained by the constitutional provision limiting it to wholesome and reasonable laws, of which the court is the final judge; but, within this limitation, the exercise of the police power of the legislature will apply to all within the scope of its terms and spirit. The fact that the rights of citizens, as previously existing, are changed, is a result which always happens; it is indeed in order to change those rights that the police power is exercised. So far as regards the rights of parties accruing after the date of the statute, they are to be governed by the statute; their rights existing prior to that date are not affected by it. To illustrate this view, let it be supposed that the case between the present parties in its original stage had been determined in favor of the manufacturers, under which decision they would have had a right to ring their bell and that afterwards a statute had been passed providing that manufacturers should not ring bells except at such hours as might be approved by the selectmen; and that these manufacturers had then proceeded to ring their bell at other hours, not included in such approval. It certainly could not be said that they had a vested right to do so, under the decision of the court.

Demurrer overruled.[1]

[1] In London, etc., Ry. v. Truman, (11 App. C. 45, 1885), it is said: "In Met. Asylum Dist. v. Hill, (6 App. C. 193, 1881), it was held that the statute authorized the building of a smallpox hospital, if it could be done without creating a nuisance; whereas the railway acts were assumed to establish the proposition that the railway might be made and used whether a nuisance were created or not." It was accordingly held that the use of a particular place for cattle yards, which without the statute would have been a nuisance, was not actionable, although the statute did not specify that the yards might be located at this place, and it was proved that they might have been so located as not to be a nuisance to householders.

BENNER v. ATLANTIC DREDGING CO.

(134 N. Y. 156.—1892.)

This action was brought to recover damages caused to a house belonging to the plaintiff at Astoria, N. Y., by blasting done by the defendant in the waters of Hell Gate, between January 5, 1887, and April 12, 1888. The complaint alleged that the defendant did "wrongfully and unlawfully so discharge such blasts * * * as to shake, jar, damage, and injure this plaintiff's said dwelling house, * * * and to create a nuisance, and did so maintain such nuisance, and so negligently and carelessly blast such rock, * * * that plaintiff's said dwelling was solely thereby shaken and injured," etc. The defendant pleaded, among other defenses, that such blasting "was done and performed under and by virtue of the authority of the United States, and under the direction of the officer of the engineer corps of the United States army in charge of said work; that such operations were a public necessity and requirement, and were duly performed in a lawful and careful manner, and without any default, negligence, or carelessness upon the part of the defendant." Evidence was given upon the trial tending to show that the plaintiff's house, which had been previously injured by explosions, was placed in good repair in November, 1886, and that afterwards, through the blasting operations of the defendant, the foundations, walls, and ceilings were cracked and injured, as alleged in the complaint. The blasting was done by the defendant under a contract dated November 16, 1886, between "Lieut. Col. Walter McFarland, corps of engineers U. S. army, of the first part, and the Atlantic Dredging Co., * * * of the second part."

LANDON, J. (after discussing other points):

That the defendant's contract was with the United States cannot be questioned upon this appeal. But it is said the authority of the United States to make the contract must be shown. We know that Congress has exclusive power to regulate commerce, both foreign and interstate, and that the improvement of rivers and arms of the sea forming the highways of such commerce is vested in the United States. (Wisconsin v. Duluth, 96 U. S. 379.) Various

acts of Congress of which we take judicial notice, since they are the supreme law of the land, appropriated moneys for the improvement of Hell Gate and authorized it. (22 U. S. St. 58, 191, 23 U. S. St. 133, 138; 24 U. S. St. 310, 318.) Other statutes bear upon the subject. The United States is a sovereign nation, with full power over the subject-matter, and may, by statute, provide for the exercise of that power in such legislative meagerness of form as suits itself. If its attempted exercise of power is complete according to its own judicial test, it is complete under ours. The case last cited is an exposition of the power of the United States under similar statutes, and we repose upon its authority. It must be held that the United States was competently authorized to make the contract, and in making it kept within its powers, both as to the subject-matter of the contract and the manner in which it engaged and authorized the defendant to perform it.

The learned trial court charged the jury that, if the explosions conducted by the defendant injured the plaintiff's house, the defendant was liable, irrespective of the question of defendant's negligence; that the question of negligence was not in the case; that, if the business could not be conducted without producing such injury, it must cease. We think this was erroneous. It is entirely clear that the defendant had all the authority of the United States to use all the means contemplated by the contract for the removal of these rocks, provided, always, that he used them carefully; care being a proper regard both to the efficient prosecution of the work and the rights of third persons; the absence of such care being negligence. The instruction of the trial judge eliminates negligence, and assumes proper care. Thus the defendant had the authority of the United States to do the work carefully, and did it within such authority. It being lawful for the sovereign to exercise its lawful power, it must follow that whatever results from its proper exercise is not unlawful, and if any injury, direct or consequential, results to the individual, he is remediless, except so far as the sovereign gives him a remedy. The government has provided for such direct injuries as amount to a taking of private property for public use, by the constitutional provision that it must not be done without full compensation. If the present were such a case, it would seem that the plaintiff's remedy would be to make the proper application to the government. The defendant, having done no more than it was fully authorized to do, and which its duty to the government

under the contract required it to do, would be blameless, and the government liable because of its constitutional obligation. But this is not a case of taking private property, or of direct, but is of consequential, injury. The plaintiff's house was 3,000 feet distant from the place of the explosions. The injuries to it were caused by the shaking of the earth or pulsations of the air, or both, resulting from the explosions. There was no physical invasion of the plaintiff's premises by casting stones or earth or other substances upon them, as in Hay v. Cohoes Co., 2 N. Y. 159; Tremain v. Same, Id. 163; St. Peter v. Denison, 58 N. Y. 416; and hence no going outside of the authority actually conferred and conferable, as in those cases. Nor was the work here prosecuted for the benefit of private ownership aided by the public grant of the privilege, as in Cogswell v. Railroad Co., 103 N. Y. 10; and hence the rules applicable to public grants of privileges to private parties or corporations have no force. This work was done under the government, for the government, and in no sense to the detriment of public rights, or to the advantage of the defendant's private ownership. The principles assumed in the case last cited amply support the defendant's position. One cannot confine the vibration of the earth or air within inclosed limits, and hence it must follow that, if in any given case they are rightfully caused, their extension to their ultimate and natural limits cannot be unlawful, and the consequential injury, if any, must be remediless. The defendant had the authority of the government, and kept within it, and therefore is not liable. Radcliff's Ex'rs v. Mayor, 4 N. Y. 195; Bellinger v. Railroad Co., 23 N. Y. 42; Marvin v. Iron Min. Co., 55 N. Y. 538; Uline v. Railroad Co., 101 N. Y. 98; Atwater v. Trustees, 124 N. Y. 602; Transportation Co. v. Chicago, 99 U. S. 635; Wood, Nuis. § 752, quoted with approval in Seifert v. City of Brooklyn, 101 N. Y. 145. * * * The judgment should be reversed and a new trial granted, costs to abide the event. All concur, except VANN, J., dissenting.

GIBSON v. UNITED STATES.

(166 U. S. 269; 17 Sup. Ct. 578.—1897.)

This was a petition to recover damages because of the construction of a dike by the United States in the Ohio river at a point off Neville Island, about nine miles west of the city of Pittsburg. Among other findings of fact, was the following:

"(5) The construction of said dike by the United States for the purposes aforesaid has substantially destroyed the landing of the claimant, by preventing the free egress and ingress to and from said landing on and in front of the claimant's farm, to the main or navigable channel of said river.

"The claimant is unable to use her landing for the shipment of products from, and supplies to, her farm for the greater part of the gardening season on account of said dike obstructing the passage of the boats; that she can only use the said landing at a high stage of water; that during the ordinary stage of water the claimant cannot get the products off, or the supplies to, her farm, without going over the farms of her neighbors to reach another landing."

The court held, as a conclusion of law, that the claimant was not entitled to recover, and dismissed the petition. Case is reported below in 29 Ct. of Cl. R. 18.

FULLER, Ch. J. * * * The fifth amendment to the constitution of the United States provides that private property shall not "be taken for public use without just compensation." Here, however, the damage of which Mrs. Gibson complained was not the result of the taking of any part of her property, whether upland or submerged, or a direct invasion thereof, but the incidental consequence of the lawful and proper exercise of a governmental power.

The applicable principle is expounded in Northern Transp. Co. v. Chicago, 99 U. S. 635. In that case, plaintiff, being an owner of lands situated at the intersection of La Salle street, in Chicago, with the Chicago river, upon which it had valuable dock and warehouse accommodations, with a numerous line of steamers accustomed to land at that dock, was interrupted in its use thereof by the building of a tunnel under the Chicago river by authority of the State legislature, in accomplishing which work it was necessary to

tear up La Salle street, which precluded plaintiff from access to its property for a considerable time; also to build a cofferdam in the Chicago river, which excluded its vessels from access to its docks; and such an injury was held to be *damnum absque injuria.* This court said, again speaking through Mr. Justice STRONG: "But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agents, or give him any right of action.

"This is supported by an immense weight of authority. Those who are curious to see the decisions will find them collected in Cooley, Const. Lim. p. 542, and notes. The extremest qualification of the doctrine is to be found, perhaps, in Pumpelly v. Green Bay Co., 13 Wall. 166, and in Eaton v. Railroad Co., 51 N. H. 504. In those cases it was held that permanent flooding of private property may be regarded as a 'taking.' In those cases there was a physical invasion of the real estate of the private owner, and a practical ouster of his possession. But in the present case there was no such invasion. No entry was made upon the plaintiff's lot. All that was done was to render for a time its use more inconvenient."

Moreover, riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the government in that regard. The legislative authority for these works consisted simply in an appropriation for their construction, but this was an assertion of a right belonging to the government, to which riparian property was subject, and not of a right to appropriate private property, not burdened with such servitude, to public purposes.

In short, the damage resulting from the prosecution of this improvement of a navigable highway, for the public good, was not the result of a taking of appellant's property, and was merely incidental to the exercise of a servitude to which her property had always been subject.

Judgment affirmed.

§ 5B.—TAKING PROPERTY.

BALTIMORE & P. RY. CO. v. FIFTH B. CHURCH.

(108 U. S. 317.—1883.)

Action in the nature of an action on the case to recover damages for the discomfort occasioned by the establishment of a building for housing the locomotive engines of a railroad company, contiguous to a building used for Sunday-schools and public worship by a religious society.

Mr. Justice FIELD. If the facts are established which the evidence tended to prove, and from the verdict of the jury we must so infer, there can be no doubt of the right of the plaintiff to recover. The engine house and repair shop of the railroad company, as they were used, rendered it impossible for the plaintiff to occupy its building with any comfort as a place of public worship. The hammering in the shop, the rumbling of the engines passing in and out of the engine house, the blowing off of steam, the ringing of bells, the sounding of whistles, and the smoke from the chimneys, with its cinders, dust and offensive odors, created a constant disturbance of the religious exercises of the church. The noise was often so great that the voice of the pastor while preaching could not be heard. The chimneys of the engine house being lower than the windows of the church, smoke and cinders sometimes entered the latter in such quantities as to cover the seats of the church with soot and soil the garments of the worshipers. Disagreeable odors, added to the noise, smoke and cinders, rendered the place not only uncomfortable but almost unendurable as a place of worship. As a consequence, the congregation decreased in numbers, and the Sunday-school was less numerously attended than previously.

Plainly the engine house and repair shop, as they were used by the railroad company, were a nuisance in every sense of the term. They interfered with the enjoyment of property which was acquired by the plaintiff long before they were built, and was held as a place for religious exercises, for prayer and worship; and they disturbed and annoyed the congregation and Sunday-school which assembled there on the Sabbath and on different evenings of the week. That

is a nuisance which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him. For such annoyance and discomfort the courts of law will afford redress by giving damages against the wrong-doer, and when the cause of the annoyance and discomfort are continuous, courts of equity will interfere and restrain the nuisance. Crump v. Lambert, L. R. 3 Eq. 409.

The right of the plaintiff to recover for the annoyance and discomfort to its members in the use of its property, and the liability of the defendant to respond in damages for causing them, are not affected by their corporate character. Private corporations are but associations of individuals united for some common purpose, and permitted by the law to use a common name, and to change its members without a dissolution of the association. Whatever interferes with the comfortable use of their property, for the purposes of their formation, is as much the subject of complaint as though the members were united by some other than a corporate tie. Here the plaintiff, the Fifth Baptist Church, was incorporated that it might hold and use an edifice erected by it, as a place of public worship for its members and those of similar faith meeting with them. Whatever prevents the comfortable use of the property for that purpose by the members of the corporation, or those who, by its permission, unite with them in the church, is a disturbance and annoyance, as much so as if access by them to the church was impeded and rendered inconvenient and difficult. The purpose of the organization is thus thwarted. It is sufficient to maintain the action to show that the building of the plaintiff was thus rendered less valuable for the purposes to which it was devoted.

The liability of the defendant for the annoyance and discomfort caused is the same also as that of individuals for a similar wrong. The doctrine which formerly was sometimes asserted, that an action will not lie against a corporation for a tort, is exploded. The same rule in that respect now applies to corporations as to individuals. They are equally responsible for injuries done in the course of their business by their servants. This is so well settled as not to require the citation of any authorities in its support.

It is no answer to the action of the plaintiff that the railroad company was authorized by act of congress to bring its track within the limits of the city of Washington, and to construct such

works as were necessary and expedient for the completion and maintenance of its road, and that the engine house and repair shop in question were thus necessary and expedient; that they are skilfully constructed; that the chimneys of the engine house are higher than required by the building regulations of the city, and that as little smoke and noise are caused as the nature of the business in them will permit.

In the first place, the authority of the company to construct such works as it might deem necessary and expedient for the completion and maintenance of its road did not authorize it to place them wherever it might think proper in the city, without reference to the property and rights of others. As well might it be contended that the act permitted it to place them immediately in front of the President's house or of the Capitol, or in the most densely populated locality. Indeed, the corporation does assert a right to place its works upon property it may acquire anywhere in the city.

Whatever the extent of the authority conferred, it was accompanied with this implied qualification, that the works should not be so placed as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property. Grants of privileges or powers to corporate bodies, like those in question, confer no license to use them in disregard of the private rights of others, and with immunity for their invasion. The great principle of the common law, which is equally the teaching of Christian morality, so to use one's property as not to injure others, forbids any other application or use of the rights and powers conferred.

Undoubtedly a railway over the public highways of the District, including the streets of the city of Washington, may be authorized by Congress, and if, when used with reasonable care, it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars, with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded. Whatever consequential annoyance may necessarily follow from the running of cars on the road with reasonable care is *damnum absque injuria*. The private inconvenience in such case must be suffered for the public accommodation.

But the case at bar is not of that nature. It is a case of the use by the railroad company of its property in such an unreasonable

way as to disturb and annoy the plaintiff in the occupation of its church, to an extent rendering it uncomfortable as a place of worship. It admits indeed of grave doubt whether congress could authorize the company to occupy and use any premises within the city limits, in a way that would subject others to physical discomfort and annoyance in the quiet use and enjoyment of their property, and at the same time exempt the company from the liability to suit for damages or compensation, to which individuals acting without such authority would be subject under like circumstances. Without expressing any opinion on this point, it is sufficient to observe that such authority would not justify an invasion of others' property, to an extent which would amount to an entire deprivation of its use and enjoyment, without compensation to the owner. Nor could such authority be invoked to justify acts, creating physical discomfort and annoyance to others in the use and enjoyment of their property, to a less extent than entire deprivation, if different places from those occupied could be used by the corporation for its purposes, without causing such discomfort and annoyance.

The acts that a legislature may authorize, which, without such authorization, would constitute nuisances, are those which affect public highways or public streams, or matters in which the public have an interest and over which the public have control. The legislative authorization exempts only from liability to suits, civil and criminal, at the instance of the State; it does not affect any claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large.

Thus, in Sinnickson v. Johnson, 2 Harr. N. J. at 151, it was held by the Supreme Court of New Jersey that an act of the legislature authorizing an individual to erect a dam across a navigable water constituted no defense to an action for damages for an overflow caused by the dam.

"It may be lawful," said the court, "for him (the grantee of the power) and his assignees to execute this act, so far as the public interests, the rights of navigation, fishing, etc., are concerned, and he may plead, and successfully plead, the act to any indictment for a nuisance, or against any complaint for an infringement of a public right, but cannot plead it as a justification for a private injury which may result from the execution of the statute."

In Crittenden v. Wilson, 5 Cow. 165, it was held by the Supreme

Court of New York that an act authorizing one to build a dam, on his own land, upon a creek or river which was a public highway, merely protected him from indictment for a nuisance. If, said the court, there had been no express provision in the act for the payment of damages, the defendant would still have been liable to pay them, and the effect of the grant was merely to authorize the defendant to erect a dam, as he might have done, if the stream had been his own, without a grant. In such a case he would have been responsible in damages for all the injury occasioned by it to others.

In Brown v. Cayuga &c. Railroad Company, 12 N. Y. 486, the company was sued for overflowing plaintiff's land by means of a cut through the banks of a stream which its road crossed. It pleaded authority by its charter to cross highways and streams, and that the cut in question was necessary to the construction and maintenance of the road. But it was held that the company was liable for damages caused.

"It would be a great stretch," said the court, "upon the language, and an unwarrantable imputation upon the wisdom and justice of the legislature, to hold that it imports an authority to cross the streams in such a manner as to be the cause of injury to others' adjoining property."

And so the court adjudged that the company was under the same obligation as a private owner of the land and stream, had he bridged it; and that the right granted to bridge the stream gave no immunity for damages which the excavation of its banks for that purpose might cause to others.

In Commonwealth v. Kidder, in the Supreme Court of Massachusetts, 107 Mass. 188, a statute of that State authorized the storage, keeping, manufacture and refining of crude petroleum or any of its products in detached and properly ventilated buildings, specially adapted to that purpose; and it was held that it did not justify the refining of petroleum at any place, where a necessary consequence of the manufacture was the emission of vapors which constitute a nuisance at common law by their unwholesome and offensive nature.

Numerous other decisions from the courts of the several States might be cited in support of the position that the grant of powers and privileges to do certain things does not carry with it any immunity for private injuries which may result directly from the exercise of those powers and privileges.

If, as asserted by the defendant, the noise, smoke and odors, which are the cause of the discomfort and annoyance to the plaintiff, are no more than must necessarily arise from the nature of the business carried on with an engine house and workshop as ordinarily constructed, then the engine house and workshop should be so remodeled and changed in their structure as to prevent, if that be possible, the nuisance complained of; and if that be not possible, they should be removed to some other place where, by their use, the plaintiff would not be thus annoyed and disturbed in the enjoyment of its property. There are many places in the city sufficiently distant from the church to avoid all cause of complaint, and yet sufficiently near the station of the company to answer its purposes.

There are many lawful and necessary occupations which by the odors they engender, or the noise they create, are nuisances when carried on in the heart of a city, such as the slaughtering of cattle, the training of tallow, the burning of lime and the like. Their presence near one's dwelling-house would often render it unfit for habitation. It is a wise police regulation, essential to the health and comfort of the inhabitants of a city, that they should be carried on outside of its limits. Slaughter-houses, lime-kilns, tallow-furnaces are, therefore, generally removed from the occupied parts of a city, or located beyond its limits. No permission given to conduct such an occupation within the limits of a city would exempt the parties from liability for damages occasioned to others, however carefully they might conduct their business. Fish v. Dodge, 4 Denio, 311.

The fact that the smokestacks of the engine house were as high as the city regulations for chimneys required, is no answer to the action, if the stacks were too low to keep the smoke out of the plaintiff's church. In requiring that chimneys should have a certain height, the regulations did not prohibit their being made higher, nor could they release from liability if not made high enough. It is an actionable nuisance to build one's chimney so low as to cause the smoke to enter his neighbor's house. If any adjudication is wanted for a rule so obvious, it will be found in the cases of Sampson v. Smith, 8 Sim. 271, and Whitney v. Bartholomew, 21 Conn. 212.

The instruction of the court as to the estimate of damages was correct. Mere depreciation of the property was not the only element for consideration. That might, indeed, be entirely disregarded.

The plaintiff was entitled to recover because of the inconvenience and discomfort caused to the congregation assembled, thus necessarily tending to destroy the use of the building for the purposes for which it was erected and dedicated. The property might not be depreciated in its salable or market value, if the building had been entirely closed for those purposes by the noise, smoke and odors of the defendant's shops. It might then, perhaps, have brought in the market as great a price to be used for some other purpose. But, as the court below very properly said to the jury, the congregation had the same right to the comfortable enjoyment of its house for church purposes that a private gentleman has to the comfortable enjoyment of his own house, and it is the discomfort and annoyance in its use for those purposes which is the primary consideration in allowing damages. As with a blow on the face, there may be no arithmetical rule for the estimate of damages. There is, however, an injury, the extent of which the jury may measure.

Judgment affirmed.

DOLAN v. CHICAGO, M. & ST. P. RY.

(118 Wis. 362; 95 N. W. 385.—1903).

WINSLOW, J. This is an action at law, to recover damages for, and secure the abatement of a nuisance. The alleged nuisance consists of stockyards maintained by defendant upon its depot grounds, to the great discomfort of the plaintiff and his family. The evidence was entirely sufficient to sustain the findings of the jury, and the questions presented are purely questions of law.

The defendant is a railway company duly chartered and operating a railroad. It is bound by positive requirement of law to receive and transport freight tendered to it for shipment, and provide suitable facilities for receiving and handling the same at any of its stations. Rev. St. 1898, § 1798. It is also required to maintain a station at every village through which it passes which has a post office and a population of 200 people or more. Id. § 1801. It must receive for carriage all live stock offered to it from February 1st to September 30th, inclusive, and properly transport the same over its road. Id. § 1799a.

In order to discharge the statutory duty of receiving and transporting live stock, it must have facilities for the purpose at its stations, or in some convenient place within a reasonable distance. Inasmuch as it cannot have a train ready at all times to immediately receive and transport the stock offered, it must necessarily have yards or inclosures in which the animals may be kept until they can be taken away in the regular course of the operation of the road. That offensive smells and unpleasant noises will inevitably come from such yards, when in use, is matter of common knowledge. The skill of man has not yet devised means, within the bounds of reasonable expense and diligence, by which these disagreeable results can be wholly avoided. It must follow that, if a railway company exercises reasonable and proper diligence and care in the location of its yards and in their management, it has performed its whole duty. impossibilities cannot be required. Duties cannot be imposed, and punishments inflicted, simply because the duties have been performed. If injury results to others, it must in such case be *damnum absque injuria.* The same rule must apply which applies to noise and smoke and steam resulting from the operation of the railroad. If these annoyances result simply from the necessary and proper operation of the road, they must be borne. If the company use the best and most improved devices to prevent injury to others, it is protected by its franchises. If it is negligent in this regard, it must respond in damages, if a nuisance is thereby created. 2 Wood on Nuisances (3d Ed.) § 755.

So, in the case of stockyards, the railway company must use all reasonable diligence in the location of its yards, to avoid injury to others, and must manage them with approved methods, using all reasonable skill to prevent their becoming a nuisance. It cannot unnecessarily or unreasonably locate its yards in close proximity to dwellings or business houses, to their injury, without incurring liability. It must, doubtless, in order to perform its duty, place the yards in a reasonably practicable and convenient location in the vicinity of its station, for the reception and shipping of cattle, but it must at the same time place them where they will do the least possible injury to others. If these requirements be fulfilled, and if the yards be operated without negligence, and with that skill and diligence to avoid noise and noxious smells therefrom which the importance of the duty demands, there can be no liability, even though injury may result to others. Such injury, like many others,

is simply one of the penalties we have to pay for the conveniences of modern methods of transportation.

Much reliance was placed by the plaintiff upon B. & P. Ry. Co. v. Fifth Baptist Church, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739, and Anderson v. C., M. & St. P. Ry. Co., 85 Minn. 337, 88 N. W. 1001. In the first of these cases a railroad company had constructed a roundhouse and machine shop next to a church, and the noise seriously disturbed the religious exercises. This was held to be an actionable nuisance, but the fact plainly appeared in the case that the location was unreasonable, and that there were many other places in the city where the shop could have been placed, and answer all the railroad purposes fully as well. These being the facts, it was held that the shop so situated was a nuisance, and that, whatever rights were conferred on the railroad company by its charter, they were subject to the qualification that their works should not be so placed as by their use to unreasonably interfere with and disturb the comfort of others. The case goes no further, and, when rightly understood, it does not antagonize the propositions already laid down in this opinion.

The second case cited is a stockyards case, and contains language tending to justify plaintiff's position here. In that case, however, the evidence established the fact that the yards were kept in an absolute filthy condition, to the extent that dead animals were allowed to remain in them and become putrid. In view of these facts, the opinion must be read. The court said, in substance, that the defendant's claim was that it had a right to select any place on its right of way for the reception and shipment of stock, but that it could not be conceded that a railroad company could rightfully create noxious conditions on its own property so near the private dwellings of others as unnecessarily to interfere with the health of the inmates. Here the element of necessity, which must mean reasonable necessity in the proper conduct of its business, is plainly recognized. This is not the case of a manufacturing company, which may purchase property and locate its works wherever it may choose. The stockyards must be adjacent to the railroad line, the location of which is fixed, and they must be at or in convenient proximity to a station. It will not do to say that the company must go out into unsettled districts in the country for its stockyards, for this is to say that, as soon as people begin to reside in the vicinity, the yards

must be again removed to some more secluded spot, and so on *ad infinitum*.

The defendant attempted to introduce evidence showing that there was no other reasonably convenient and practicable location at Cashton for the yards, but the evidence was excluded. This was plainly error. I. C. R. Co. v. Grabill, 50 Ill. 241; Dunsmore v. Ry. Co., 72 Iowa, 182, 33 N. W. 456; Shirely v. Ry. Co., 74 Iowa, 169, 37 N. W. 133, 7 Am. St. Rep. 471. The verdict fails entirely to determine the fact whether the location was a reasonably proper one, and also fails to find whether the company operated the yard upon approved methods, and used reasonable skill and diligence in preventing unhealthy conditions and unpleasant noises therein. In the absence of findings on these questions, the judgment cannot be sustained. Judgment reversed and action remanded for a new trial.[1]

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§ 5C.—DESTRUCTION OF PROPERTY BY MINISTERIAL OFFICERS.

BAIR v. STRUCK.

(29 Mon.—; 74 Pac. 69.—1903.)

HOLLOWAY, J. This action was commenced by the plaintiff, Bair, to recover damages from the defendant for injury to personal property. The complaint alleges that in August, 1899, the plaintiff was the owner of 150 head of Merino bucks, which had lately been imported into this state from the state of Oregon; that the defendant

[1] Georgia Ry. & B. Co. v. Maddox, 116 Ga. 64, 42 S. E. 315 (1902), accord. In Marchant v. Penn. Ry. 153 U. S. 380; 14 Sup. Ct. 894 (1894). the court distinguishes between taking property and subjecting it to consequential damages: "It should also be observed that the plaintiff does not complain that, by any legislative enactment, she had been denied rights granted to others, but she attributes error to the judgment of the supreme court of Pennsylvania in construing that provision of the constitution of the state which gives a remedy for the property injured by the construction of a railroad, as not extending the remedy to embrace property injured by the lawful operation of the railroad. It is not pretended that by such a construction of the law the plaintiff has been deprived of any right previously enjoyed. The scope of the remedy added by the constitution of 1874 to those previously possessed by persons whose property is affected by the erection of a public work is declared by the court not to embrace the case of damages purely consequential. In so holding it does not appear to us that the supreme court of Pennsylvania has either deprived the plaintiff of property without due process of law, or denied her the equal protection of the law, and its judgment is accordingly affirmed." And see Bedford v. United States, 192 U. S. 217; 24 Sup. Ct. 238 (1904).

was deputy sheep inspector for Yellowstone county, and as such took the sheep from the possession of the plaintiff, and subjected them to certain quarantine regulations; that none of the sheep were diseased; that the defendant wrongfully and negligently prepared the materials used for dipping the sheep, and put therein carbolic acid or other poisonous matters in such quantities that 69 head of said sheep were killed, and the remaining 81 so badly injured as to render them unfit for breeding purposes, for which they were purchased. The prayer of the complaint was for $2,100 damages.

The defendant admitted in his answer that he was deputy sheep inspector, and that as such he dipped the sheep in question on August 20, 1899, and denied the other material allegations of the complaint. By way of an affirmative defense the defendant alleged that the dipping of the sheep in question was done by him under and by virtue of a quarantine proclamation issued by the Governor of Montana on April 15, 1899. The cause was tried to a jury, which returned a verdict in favor of the plaintiff for $1,055.50, and from the judgment entered for the amount of the verdict and costs, and from an order denying the defendant a new trial, these appeals are taken.

In the appellant's brief only two propositions are argued: (1) Does the complaint state a cause of action? And (2) did the court err in excluding a certain offer of proof made by the defendant and in sustaining objections to certain questions asked the defendant?

1. It is earnestly contended that the complaint shows on its face that in the discharge of his duties the defendant acted as a quasi judicial officer, and therefore is not liable for damages arising from his negligence, and would only be liable for such damages as were occasioned by his willful or wanton misconduct, and no such misconduct is alleged. Such portions of the Political Code as are applicable to the facts of this case read as follows:

"Sec. 3034. Whenever the Governor, by proclamation, quarantines [sheep] for inspection as provided in the next section any sheep brought into Montana, the deputy inspector of the county in which such sheep may come, must immediately inspect the same, and if he finds that they are infected with scab, or any other infectious disease, he must cause the same to be held within a certain limit or place in his said county, to be defined by him until such disease has been eradicated, as provided in the next preceding section.

"Sec. 3035. Whenever the Governor has reason to believe that any disease mentioned by this article has become epidemic in certain localities in any other state or territory, or that conditions exist that render sheep likely to convey disease, he must thereupon by proclamation, designate such localities and prohibit the importation from them of any sheep into this state, except under such restrictions as he, after consultation with the veterinary surgeon, may deem proper."

Acting under the authority of these sections, the Governor of Montana, on April 15, 1899, issued a proclamation, the pertinent portions of which read as follows: "Whereas, I have reason to believe that conditions exist which render the class of sheep herein designated rams, or bucks, or stock sheep, when brought into this State, liable to convey the disease known as 'scab,' it is hereby ordered that all rams, or bucks, or stock sheep, imported into the State of Montana, from any other state or territory of the United States or foreign countries whatsoever, must when shipped be loaded at point of starting into properly disinfected car or cars, and shipped in such properly disinfected car or cars into this State, where, upon arrival at the State line of Montana, or the closest available point thereto where the sheep are to be unloaded to be driven to destination in the state, and before being turned upon the public domain or upon private premises, and all rams, bucks, or stock sheep driven into or through any portion of this State from any adjoining state or country, avoiding all quarantine yards and areas, shall be held at such point or points as may be hereinafter designated and there dipped under the supervision of the state veterinarian through the deputy sheep inspector of the county into which the sheep are to remain and said sheep shall be dipped in some recognized and reliable dip known to be efficient in the cure of scab, twice, the second dip to occur within 10 days or between 10 and 12 days after the first dipping."

Under the foregoing provisions it was made the duty of the Governor to determine what sheep, not themselves diseased, should be quarantined, and to prescribe the quarantine regulations. In doing so he doubtless acted in a quasi judicial capacity, and, having once determined that fact, and having prescribed such regulations in his proclamation, the only duty devolving upon the defendant was to carry such regulations into effect.

But it is contended that under the provisions of the Governor's

proclamation—" said sheep shall be dipped in some recognized and reliable dip, known to be efficient in the cure of scab "—the defendant was called upon to exercise his judgment and discretion in determining the material to be used and the method of its application, and in this he acted in a quasi judicial capacity. With this contention we cannot agree. The law contemplates that only men who, by their skill and experience, are competent, shall be appointed such deputies, and invested with the duty of carrying into execution this police power of the State. The mere fact that such officers are called upon to exercise some discretion or judgment in selecting materials to be used and the manner of their use does not change the character of their acts from ministerial to judicial or quasi judicial ones. Experience teaches that few, if any, ministerial officers are not called upon to exercise some judgment or discretion in the performance of their official duties. But, if the contention of the appellant be sustained, the distinction between ministerial and quasi judicial acts is practically abolished.

As distinguishing between acts quasi judicial and acts ministerial in their character, the following definitions we think correctly state the law: "Quasi judicial functions are those which lie midway between the judicial and ministerial ones. The lines separating them from such as are thus on their two sides are necessarily indistinct; but, in general terms, when the law, in words or by implication, commits to any officer the duty of looking into facts, and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is termed quasi judicial." Mechem on Public Officers, § 637; Bishop on Non-Contract Law, §§ 785, 786. "Where a power rests in judgment or discretion, so that it is of a judicial nature or character, but does not involve the exercise of the functions of a judge, or is conferred upon an officer other than a judicial officer, the expression used is generally 'quasi judicial.' * * * * The officer may not in strictness be a judge; still, if his powers are discretionary, to be exerted or withheld according to his own view of what is necessary and proper, they are in their nature judicial." Throop on Public Officers, § 534. "A ministerial act may perhaps be defined to be one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment upon the propriety of the act done." Id. § 537; Flournoy v. Jeffersonville, 17 Ind. 169, 79 Am. Dec. 468; Penning-

ton v. Streight, 54 Ind. 376. "* * * * In the same line, a ministerial act has also been defined as an act, performed in a prescribed manner, in obedience to the law or the mandate of legal authority, without regard to, or the exercise of, the judgment of the individual upon the propriety of the acts being done." Mechem on Public Officers, § 657. An act is not necessarily taken out of the class styled "ministerial" because the officer performing it is nevertheless vested with a discretion respecting the means or the method to be employed. Such is not the judgment or discretion which is an essential element of judicial action. McCord v. High, 24 Iowa, 336; Grider v. Tally, 77 Ala. 422, 54 Am. Rep. 65; Mechem on Public Officers, § 658; Ency. Law (2d Ed.) 377. * * * * The question involved in this controversy is not whether the policy adopted was wise, but whether a wrong was done in the details of its execution. We are of the opinion that in the discharge of his duty the defendant acted in a ministerial capacity only. * * * * The judgment and order denying defendant a new trial are affirmed.

Affirmed.

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§ 6.—DEFENSE OF SELF AND PROPERTY.

ANONYMOUS.

(Year Book, 19 Henry IV. f. 31, pl. 59.—1440.)

A writ of trespass was brought by A. against another. And counted by Fortescue how the defendant with force him assaulted, wounded, and ill-treated. Markham. You ought not to have an action, for we say that the plaintiff, in the same place where he supposes the trespass, came and took certain goods of the defendant, viz., etc., and the defendant bade him leave the goods, and the plaintiff would not, whereupon he took them out of his possession, as he lawfully might, and the wrong which he had was in defense of our goods, and we do not at all understand that for this he ought to maintain an action. * * * *

PASTON, J. The whole plea *ut supra* shall be entered on the roll; for it does not appear to be a plea of assault merely, as you allege, and it will be mischievous to the defendant to have so general a plea

as you would claim, and it will be more reasonable to allege the whole matter *ut supra,* so that the jurors shall have knowledge of the whole matter, than to rule the defendant to so general a plea; for it does not lie in the knowledge of the jurors whether this was merely an assault or not. And suppose that a man was about to carry off your wife, would you not beat him? And notwithstanding that you beat him in defense of your wife, you shall be excused in law; for it is in defense of your chattel; and all this matter shall be entered on the roll *ut supra,* wherefore it seems to me to have been well pleaded. NEWTON, C. J., to the same intent. For, if a man will take my horse from me, or any thing which belongs to me, and I will not suffer him to do it, although he is hurt, in this case I shall be excused in law. And suppose that a man is about to beat my servant, and I aid my servant in his defense, although the other is hurt by me, all this matter shall be adjudged in defense of my servant, and of my goods. For, since he was about to injure me, this malfeasance shall be said to be an assault upon me begun by him, and all this shall be said to be in defense of the goods and chattels of the defendant. Wherefore, etc. And so was the opinion of AYSCOGHE, FULTHORPE, JJ., and all the Court. *Quod Nota.*

ANONYMOUS.

(Year Book, 21 Henry VII. f. 39, pl. 50.—1505.)

FINEUX, C. J. If a man is in his house, and hears that such a one is coming to his house to beat him, he may well collect his friends and neighbors to help him in the defense of his person. But if one threatens to beat him if he goes to such a market or such other place, he may not lawfully collect his friends to protect him while going thither, because it is not necessary for him to go, and he may have his remedy by a bond to keep the peace. But one's house is his castle and defense, where he may properly abide. And all the judges agreed that a servant may beat one in defense of his master. TREMAILE, J., said that a servant might kill another to save the life of his master, if the latter could not otherwise escape.

DOLE v. ERSKINE.

(35 N. H. 503.—1857.)

EASTMAN, J. The only reported decision that we have been able to find, where the question presented was the same as that raised in the case before us, is that of Elliott v. Brown, 2 Wendell, 499. In that case it was held that the party first attacked, in a personal rencounter between two individuals, is not entitled to maintain an action for an assault and battery, if he uses so much personal violence towards the other party, exceeding the bounds of self-defense, as could not be justified under the plea of *son assault demesne,* were he a party defendant in a suit.

If the rule laid down in that case is sound law, this suit cannot be sustained, for the commissioner to whom the action was referred has reported, that, although the defendant committed the first assault, yet the plaintiff used more force than was necessary or justifiable in repelling that assault.

The ground upon which the decision in Elliott v. Brown was placed, is, that there cannot be a recovery in cross actions for the same affray, but that the party who first recovers may plead that recovery in a suit against himself. No authority is cited to sustain that position, and it appears to us that it is not well founded.

If an assault is made upon a party, it may be repelled by force sufficient for self-defense, even to the use of violence; and if no more force is used than what is necessary to repel the attack, the party assaulted may, under the plea of *son assault demesne,* show the facts and have judgment. To this extent the law is well settled. (2 Greenl. Ev. sec. 95, and authorities cited.) If the affray stops there, the party first assailed, being justified in what he has done in self-defense may have his action for the injury that he has received. He has himself done nothing more than what the law permits; but the other party, in commencing and following up the assault, is liable not only for a breach of the peace, but for all the personal injuries that he has inflicted.

But if the person assaulted uses excessive force, beyond what is necessary for self-defense, he is liable for the excess, and the facts may be shown under the replication of *de injuria.* (Curtis v. Car-

son, 2 N. H. 539; Hannen v. Edes, 15 Mass. 349; Cockcroft v. Smith, Salk. 642; Bul., *Nisi Prius,* 18.)

Up to the time that the excess is used, the party assaulted is in the right. Until he exceeds the bounds of self-defense he has committed no breach of the peace, and done no act for which he is liable; while his assailant, up to that time, is in the wrong, and is liable for his illegal acts. Now, can this cause of action which the assailed party has for the injury inflicted upon him, and which may have been severe, be lost by acts of violence subsequently committed by himself? Can the assault and battery, which the assailant himself has committed, be merged in or set off against the excessive force used by the assailed party? Unless this be so, and the party first commencing the assault and inflicting the blows, and thus giving to the other side a cause of action, can have the wrong thus done and the cause of action thus given, wiped out by the excessive castigation which he receives from the other party, then each party may sustain an action; the one that is assailed, for the assault and battery first committed upon him, and the assailant, for the excess of force used upon him beyond what was necessary for self-defense.

We think that these are not matters of set-off; that the one cannot be merged in the other, and that each party has been guilty of a wrong for which he has made himself liable to the other. There have, in effect, been two trespasses committed; the one by the assailant in commencing the assault, and the other by the assailed party in using the excessive force; and, upon principle, we do not see why the one can be an answer to the other, any more than an assault committed by one party on one day can be set off against one committed by the other party on another day. The only difference would seem to consist in the length of time that has elapsed between the two trespasses. In a case where excessive force is used, the party using it is innocent up to the time that he exceeds the bounds of self-defense. When he uses the excessive force, he then for the first time becomes a trespasser And wherein consists the difference, except it be that of time, between a trespass committed by him then, and one committed by him on the same person the day after?

In Eliott v. Brown it is conceded that both parties may be indicted and both be criminally punished, notwithstanding it was there held that a civil action can be maintained only against him who has been guilty of the excess. If this be so, and each party can be criminally

punished, then each must have been guilty of an assault and battery upon the other; and if thus guilty, why should not a civil action be maintained by each? It would seem that the fact that both are indictable shows that each is in the wrong as to the other, and that each has a cause of action against the other, and that such cause of action may be successfully prosecuted, unless one is to be set off against the other. That torts are not the subject of set-off is entirely clear.

We arrive, then, at the conclusion that the causes of action existing in such cases cannot be set off, the one against the other, nor merged, the one in the other, but that each party may maintain an action for the injury received; the assailed party, for the assault first committed upon him, and the assailant for the excess above what was necessary for self-defense. This rule, it appears to us, will do more justice to the parties and more credit to the law than the other, for by it the party who has commenced the assault, and who has been the moving cause of the difficulty, is made to answer in money, instead of having his assault merged in the one which he has provoked, and which has been inflicted upon him by his antagonist.

We think, also, that the view of the case which we have taken derives much strength from the fact that no precedent can be found of any pleading sustaining the defendant's views. It is remarkable that such a plea cannot be found in any of the books, if the defense has ever been regarded by the courts as good law. * * * * Our opinion is, that, upon the facts stated, the plaintiff would be entitled to judgment.[1]

THORNTON v. TAYLOR.

(54 S. W. (Ky.) 1899.)

DU RELLE, J. This was a suit for damages for assault and battery, and is now before us for the second time on appeal. The facts as they appear upon this appeal are not substantially different from those stated in the former opinion. 39 S. W. 830. There was evidence tending to show that at the time appellant struck appellee she was advancing upon him with her arms extended in such

[1] Cf. Gutzman v. Clancy, 114 Wis. 589, 90 N. W. 1081, 58 L. R. A. 744 (1902.)

a manner as to indicate an intention to assault him, and was followed by several members of her family, with one of whom appellant had, almost immediately theretofore, had two fights. The instruction given upon the defense pleaded and relied on that appellant was resisting an assault by appellee and other members of her family is correct had the assault pleaded and attempted to be shown been made by her alone. But, in view of the evidence,—which at least renders it doubtful whether appellant did not have reasonable grounds for believing an attack was being made upon him by the entire family,—we think the trial court should have given the law upon that hypothesis. It should have instructed the jury that, if he struck her in his necessary, or apparently necessary, self-defense from bodily harm or personal violence then and there about to be inflicted upon him by her and others acting in concert with her, using no more force than was apparently necessary to repel such assault, they should find for appellant.

An instruction embodying this idea was asked for and refused. It seems to us obvious that by limiting his right to use force in self-defense to such force, as was necessary to repel the assault of the woman alone, the appellant must have been prejudiced in the minds of the jury. There is an essential difference between an assault by one person and one by a body of persons united in making the assault,—as in the case of a body of rioters. In the latter case as said in Higgins v. Minaghah, 78 Wis. 602: 47 N. W. 941, "the assaulted party may act with more promptness, and resort to more forcible means to protect himself," than in the case of an assault by a single person. The jury may well be supposed, under the instruction given in this case, to have considered appellant limited to the use of such force as was necessary to hold a woman so that she alone could do him no personal injury, and to have considered that this would not have required any great degree of force. But it is apparent that a joint attack by a party of five men and women is an entirely different matter; and if it was necessary, or from the actions and conduct of appellee and those with her was apparently necessary, for appellant, in the exercise of a reasonable discretion, to resist such an attack, he was entitled to have the jury consider whether he used undue and unnecessary violence in resisting an assault by several, instead of an assault by one.

We regret that our views constrain us to permit this litigation to be further protracted, but, being of opinion that the error to the

prejudice of appellant's rights was substantial, the judgment is reversed, and cause remanded, with directions to award him a new trial, and for further proceedings consistent herewith.

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§ 6A.—RECAPTION OF PROPERTY.

BLADES v. HIGGS.

(10 C. B. N. S. 713 : 30 L. J. C. P. 347.—1861.)

TRESPASS. Declaration, that the defendants assaulted and beat, and pushed about the plaintiff, and took from the plaintiff the plaintiff's goods, that is to say, dead rabbits.

Third plea, as to the assaulting, beating, and pushing the plaintiff, that the plaintiff at the said time when, &c., had wrongfully in his possession certain dead rabbits of and belonging to the Marquis of Exeter, and the said rabbits were then in the possession of the plaintiff without the leave and license and against the will of the said marquis, and the plaintiff was about wrongfully and unlawfully to take and carry away the said rabbits and convert the same to his own use, whereupon the defendants, as the servants of the said marquis, and by his command, requested the plaintiff to refrain from carrying away and converting the same rabbits, and to quit possession thereof to the defendants as such servants, which the plaintiff refused to do; and thereupon the defendants, as the servants of the said marquis and by his command, gently laid their hands upon the plaintiff, and took the said rabbits from him, using no more force than necessary, which are the alleged trespasses.

Demurrer and joinder.

ERLE, C. J. In this case the declaration was for assault and battery, and the substance of the justification was, that the plaintiff having wrongfully in his possession rabbits belonging to the defendant (we consider the servants here the same as the master), and being about to carry them away, the defendant requested him to refrain, and on his refusal *molliter manus imposuit*, and used no more force than was necessary to take the rabbits from him. To this the plaintiff demurred, and thereby admits that he was doing the wrong, and that the defendant was maintaining the right, as alleged; and

he contends that the defendant is not justified in using necessary force on account of the danger to the public, but adduces no authority to support his contention. The defendant also has adduced no case where this justification was supported without an allegation to explain how the plaintiff took the property of the defendant and became the holder thereof. But the principles of law are in our judgment decisive to show that the plea is good, although that allegation is not made. If the defendant had actual possession of the chattel, and the plaintiff took it from him against his will, it is not disputed that the defendant might justify using the force sufficient to defend his right and retake the chattel; and we think that there is no substantial distinction between that case and the present; for if the defendant was the owner of the chattel, and entitled to the possession of it, and the plaintiff wrongfully detained it from him after request, the defendant in law would have the possession, and the plaintiff's wrongful detention against the request of the defendant would be no possession, but would be the same violation of the right of property as the taking of the chattel out of the actual possession of the owner. It has been decided that the owner of land entitled to the possession may enter thereon and use force sufficient to remove a wrong-doer therefrom. In respect of land as well as chattels the wrong-doers have argued that they ought to be allowed to keep what they are wrongfully holding, and that the owner cannot use force to defend his property, but must bring his action, lest the peace should be endangered if force was justified. See Newton v. Harland, 1 M. & G. 644. But in respect of land, that argument has been overruled in Harvey v. Brydges, 14 M. & W. 442. There PARKE, B., says, "Where a breach of the peace is committed by a freeholder, who, in order to get possession of his land, assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public for a forcible entry, he is not liable to the other party; and I cannot see," he says, "how it is possible to doubt that it is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant, who was owner, and that he entered upon it accordingly, even though in so doing a breach of the peace was committed."

In our opinion all that is so said of the right of property in land applies in principle to the right of property in a chattel, and supports the present justification. If the owner was compelled by law to

seek redress by action for a violation of his right of property, the remedy would be often worse than the mischief, and the law would aggravate the mischief instead of redressing it, and on these grounds our judgment is for the defendant.

Judgment for the defendants.

KIRBY v. FOSTER.

(17 R. I. 437; 22 At. 1111.—1891.)

STINESS, J. The plaintiff was in the employ of the Providence Warehouse Co., of which the defendant, Samuel J. Foster, was the agent, and his son, the other defendant, an employee. A sum of fifty dollars belonging to the corporation had been lost, for which the plaintiff, a bookkeeper, was held responsible, and the amount was deducted from his pay. On January 20, 1888, Mr. Foster handed the plaintiff some money to pay the help. The plaintiff, acting under the advice of counsel, took from this money the amount due him at the time, including what had been deducted from his pay, put it into his pocket, and returned the balance to Mr. Foster, saying he had received his pay and was going to leave, and that he did this under advice of counsel. The defendants then seized the plaintiff and attempted to take the money from him. A struggle ensued, in which the plaintiff claims to have received injury, for which this suit is brought. The jury having returned a verdict for the plaintiff, the defendants petition a new trial on exceptions to the rulings and refusals to rule of the presiding justice. It is unnecessary to repeat the several exceptions, since they involve substantially but one question, viz: whether the defendants were justified in the use of force upon the plaintiff to retake the money from him. * * * Unquestionably, if one takes another's property from his possession without right and against his will, the owner or person in charge may protect his possession, or retake his property, by the use of necessary force. He is not bound to stand by and submit to wrongfull dispossession or larceny when he can stop it, and he is not guilty of assault in thus defending his right, by using force to prevent his property from being carried away. But this right of defense and recapture involves two things: first, possession by the

owner, and, second, a purely wrongful taking or conversion, without a claim of right. If one has intrusted his property to another, who afterwards, honestly though erroneously, claims it as his own, the owner has no right to retake it by personal force. If he has, the actions of replevin and trover in many cases are of little use. The law does not permit parties to take the settlement of conflicting claims into their own hands. It gives the right of defense, but not of redress. The circumstances may be aggravating; the remedy at law may seem to be inadequate; but still the injured party cannot be arbiter of his own claim. Public order and the public peace are of greater consequence than a private right or an occasional hardship. Inadequacy of remedy is of frequent occurrence, but it cannot find its complement in personal violence. Upon these grounds the doctrine contended for by the defendants is limited to the defense of one's possession and the right of recapture as against a mere wrong-doer. It is therefore to be noted in this case that the money was in the actual possession of the plaintiff, to whom it had been intrusted for the purpose of paying help, who thereupon claimed the right to appropriate it to his own payment, supposing he might lawfully do so. Conceding that the advice was bad, nevertheless, upon such appropriation the plaintiff held the money adversely, as his own, and not as the servant or agent of the company. If his possession was the company's possession, then the company was not deprived of its property, and there could be neither occasion nor justification for violence. Possession by the company would be constructive merely, which would cease when the plaintiff exercised dominion and control on his own behalf under an honest claim of right. It is only in this way, in many cases, that conversion is established. * * * In the most favorable view of the case for the defendants, the plaintiff having obtained the money by no crime, misrepresentation, or violence, nor against the will of its owner, retained it wrongfully. In such cases the rule is clearly stated in Bliss v. Johnson, 73 N. Y. 529: "The general rule is, that a right of property merely, not joined with the possession, will not justify the owner in committing an assault and battery upon the person in possession, for the purpose of regaining possession, although the possession is wrongfully withheld." See also, Harris v. Marco, 16 S. Car. 575; Barnes v. Martin, 51 Wisc. 240; Andre v. Johnson, 6 Blackf. Ind. 375.

In Commonwealth v. McCue, 16 Gray, 226, it was held that an

owner of cattle, which had been taken up by one who claimed to be a field driver, had no right to commit an assault in retaking his property, even though the complainant acted only as an officer *de facto* and demanded illegal fees. But, it is said, the plaintiff was about to carry away the money against the will of the owner. Undoubtedly this was so; but this is true in every case of wrongful conversion of property. If it be not taken against the will of the owner, it cannot be retaken by force, but only by the usual civil remedy. The defendants cite the following cases, which, it will be seen, are plainly distinguishable from the case at bar. Blades v. Higgs, 10 C. B. N. S. 713. This was on demurrer to a plea, which set up that the plaintiff had possession, wrongfully and against the will of the owner, of certain property, which the plaintiff was about to carry away. The plea was held to be a good justification for necessary force, upon the assumed ground that the defendants had actual possession of the chattels, which the plaintiff took against their will. In Johnson v. Perry, 56 Vt. 703, and Gyre v. Culver, 47 Barb. S. C. 592, there was no claim of right on the part of the plaintiff to the property he had taken. In Hodgeden v. Hubbard, 18 Vt. 504, the plaintiff obtained the property by false representation. Baldwin v. Hayden, 6 Conn. 453, apparently sustains the defendants' contention that an owner has a right to retake property intrusted to another, if he is about to carry it away; yet it does not appear in that case that the defendant made any claim of title to the paper in question, only that he supposed he had permission to take it away. State v. Elliott, 11 N. H. 540, is in the same line, but extremely guarded in expression. It appears to have been a very slight assault, which the court was quite willing to justify, without consideration of authorities. But the court says the right of recapture of property is far more limited than that of its defense, and recognizes the question whether the person removing it is a mere wrong-doer, as one of the questions to be determined. * * * We think, therefore, with reference to the case as it stood, there was no error in the charge as given, nor in the refusals to charge as requested.

§ 6B.—DEFENSE OF PROPERTY.

TULLAY v. REED.

(1 C. & P. 284.—1833.)

This was an action for assaulting and beating the plaintiff, in which the defendant pleaded the general issue; and a special plea of *molliter manus imposuit.*

Evidence was given of the assault on the part of the plaintiff, and evidence in support of the special plea was given on the part of the defendant.

PARK, J., laid it down as clear law that if a person enters another's house with force and violence, the owner of the house may justify turning him out (using no more force than is necessary), without a previous request to depart; but if the person enters quietly, the other party cannot justify turning him out without a previous request to depart.

Verdict for the defendant.[1]

LIVERMORE v. BATCHELDER.

(141 Mass. 179: 5 N. E. 275.—1886.)

Tort for killing the plaintiff's dog. Trial in the Supreme Court, without a jury, before BRIGHAM, Ch. J., who found the following facts: The plaintiff, on February 20, 1884, was the owner of a dog, which was duly licensed by the town of Reading, and wore a collar, duly marked as required by the Pub. Sts. c. 102, sec. 80. On said February 20, the plaintiff's dog with another dog, came upon the defendant's premises and there killed and maimed hens of the defendant, which were in his hen-house or shed. The dogs were driven away, and, in about fifteen minutes afterwards, came again upon the defendant's premises and were running toward the same shed and hen-house of the defendant, when the defendant, having reasonable cause to believe that the dogs were proceeding to maim

[1] In Hannabalson v. Sessions, 116 Ia. 457, 90 N. W. 93 (1902), it was held that a landowner may use reasonable and necessary force in expelling a trespasser. In Conners v. Welsh, 131 N. Y. 590, 30 N. E. 59 (1892), the defendant's conduct in stoning trespassers was held unreasonable.

and kill others of his hens in said shed and hen-house, shot and killed the plaintiff's dog.

Upon these facts the judge ruled that the defendant's killing of the plaintiff's dog under the circumstances stated, was not in law justifiable; and thereupon found and ordered judgment for the plaintiff. The defendant alleged exceptions.

HOLMES, J. The ruling of the court, as we understand it, meant that the facts found, without more, did not disclose a justification for killing the plaintiff's dog. It was found that the defendant had reasonable cause to believe that the dog was proceeding to maim and kill his hens, but not that he had reasonable cause to believe that it was necessary to kill the dog in order to prevent him from killing the hens. The justification, therefore, was not made out. (Wright v. Ramscot, 1 Saund. 84; Janson v. Brown, 1 Camp. 41. See Commonwealth v. Woodward, 102 Mass. 155, 161.)

Exceptions overruled.[1]

[1] In Cobb. v. Carter, 59 S. C. 462, 88 S. E. 114 (1901), the Court said: "The charge was, substantially, that a man had a right to put poison out on his premises for the protection of his property, having a due regard for the safety of human life, and that if a neighbor's dog came trespassing, and got the poison, the defendant would not be liable; but that if he placed the poison out, not to protect his property, but with the intention to kill his neighbor's dog, then he would be liable." There is a familiar and wholesome maxim of law, *Sic utere tuo ut alienum non lædas.* When a person puts out poison on his premises, he knows that the natural—indeed, the intended— result is to destroy his neighbor's animals. Knowing and intending such to be the result, he should be guided by reason and prudence in thus destroying the property of others. The presiding judge did not charge that a person had an absolute right to put out poison on his premises, but that it was to be exercised with limitations, which he stated. The rule which the law prescribes is that a person exercising the right to put out poison on his premises shall act with such care as might reasonably be expected of a man possessing ordinary prudence under like circumstances. The fact that the animal at the time it eats the poison may have been prowling or trespassing is a circumstance to be considered by the jury in determining whether the person placing the poison acted with ordinary prudence, but the court cannot charge, without invading the province of the jury, that this circumstance was sufficient to enable them to find a verdict in favor of the defendant. The charge of the presiding judge was not in accord with the rule hereinbefore stated, and was therefore erroneous, in my opinion. The members of this court are, however, equally divided in opinion, and the judgment of the circuit court for the defendant is affirmed."

CHAPMAN v. DECROW.

(98 Me. 378; 45 At. 295.—1899.)

STROUT, J. Trespass for killing plaintiff's dog. Defendant claimed that the dog was trespassing on his premises, and was "then, or had been immediately before the shooting, engaged, with two other dogs, in chasing and worrying his domesticated animals, to wit, tame rabbits," and that the killing was therefore justified. * * *

The defendant justified the killing upon the ground that the dog was worrying his rabbits. He asked the court to instruct the jury "that if the jury find that, at the time of the shooting of the dog, he had killed or wounded the defendant's domesticated animals on the defendant's premises, and was again there apparently for the purpose of destroying others, the defendant would not be liable for killing the dog, but would be justified in so doing, even though the dog was not at the time in the act of destroying or worrying the animals."

This instruction was refused, and rightly so. It was too broad. Rev. St. c. 30, § 2, provides that "any person may lawfully kill a dog that suddenly assaults him or another person, when peaceably walking or riding, or is found worrying, wounding or killing any domestic animal, outside of the inclosure or immediate care of his owner." Under this statute it is not enough that the dog may have worried or killed a domestic animal before, nor that there is a belief or apprehension that he intends to do so, to justify the killing; but he must be in the act, or, in the language of the charge in this case, "the worrying and the shooting must be substantially at the same time." "If he had been worrying the defendant's rabbits, and had been merely momentarily checked or held at bay by the girls at the door, or the hired man, or anybody else, and the dog had not quit the chase, but was still intent at a little distance from out his tracks where he had previously begun to worry the animals, and he was still intent upon the act of worrying,—either returning or ready to return as soon as the obstructions for getting at the rabbits were removed from him,—I think you would be authorized, if you see fit, to say that his worrying and killing were co-existent acts, concurrent acts, done at the same time; that they were one transaction."

The defendant has no reason to complain of this instruction. In

Morris v. Nugent, 7 Car. & P. 572, it was held that, to justify shooting a dog, he must be actually attacking a party at the time. In that case the dog ran out and bit the defendant's garter, and the defendant turned round and raised his gun, and the dog ran away, and he shot the dog as he was running away; and it was held he was not justified. So, to justify shooting a dog because he was worrying fowl, and could not otherwise be prevented, the party must show that the dog was in the act of worrying at the time. Janson v. Brown, 1 Camp. 41. See, also, Wells v. Head, 4 Car. & P. 568. It is not sufficient that the party had reasonable cause to believe that the dog was proceeding to worry the animals, but he should also have reasonable cause to believe that it was necessary to kill the dog to prevent him from killing the animals. So held in Livermore v. Batchelder, 141 Mass. 179, 5 N. E. 275.

FISHER v. BADGER.

(95 Mo. App. 209; 69 S. W. 26.—1902.)

BROADDUS, J. Plaintiff, who was the owner of a foxhound, sued defendant for his value, who was shown to have shot and killed him on the night of the 11th day of June, 1900. He recovered judgment for $20, from which defendant appealed. The evidence showed that the dog was a pure English foxhound and a fine animal. * * * But dogs may commit depredations other than upon domestic animals, for which they may be killed. If one viciously attacks a person, the person may kill him to protect his person. A mad dog may be killed by any one, although there be no statute authorizing it. See Bouv. Law Dict. 442, and cases cited. There may be many instances in which a dog may be killed to protect property outside of the statute, and we unhesitatingly hold, upon principle, that if a man kills the dog of another necessarily, in the protection of himself, family, or property, he is justified in so doing. He has no other remedy. It would be illogical to hold that a man could not defend his home from the intrusion and depredations of dogs. It is said that "every man's dwelling is his castle, that even the king may not enter, if forbidden." If the king cannot enter against the owner's consent, his dog cannot enter. What is the owner to do

when he has secured his dwelling by closing his door, and finds, on awakening in the nighttime, that it has been forced and entered by a thieving dog, and his property stolen or destroyed? He has no redress against the owner of the dog, even if he knows who such owner is, unless he can bring home to him the knowledge of its mischievous propensities. If a vicious animal breaks into the close of the owner, and is found destroying property, he may kill him to protect such property. Parrott v. Hartsfield (N. C.), 32 Am. Dec. 673. Every man's dwelling is sacred against the mischievous intrusions of either man or beast. An officer of the law cannot enter against the consent of the owner, except in cases of felony, unless such officer is armed with a writ emanating from the State.

The facts of the case show that the defendant had secured the screen door to his kitchen, and that during the night he was awakened and found the plaintiff's dog, which he did not know, had broken the screen and entered, and as the dog came out he shot and killed him. Upon investigation he ascertained that his milk that was placed upon a shelf by his wife had been destroyed by the dog. We believe, under the circumstances, he had the right to kill him. Because he killed the dog after, and not while he was in the act of committing the depredation, could make little or no difference, for it is a well-known fact that a thieving dog, when he has once obtained what he is in pursuit of, will come again for the same purpose. The exasperating experience of every farmer's wife attests that this is almost invariably the case with thieving dogs; and we hold that, under the circumstances, the court committed error in not permitting defendant to show that his milk had been destroyed a short time before in the night, which had been placed on a shelf in the back porch, as it was reasonably probable it was destroyed by the same dog. We think the defendant was entitled to have had his case go to the jury. If he had reasonable grounds to believe, when he shot and killed the dog, that it was necessary to protect his property, he was justified. We further hold that a thieving dog is as much a common nuisance as a sheep-killing dog, and as such is not entitled to the protection of the law, for there is no way to avoid his depredations except to kill him unless the owner, knowing his evil propensities, restrains him. But we know the latter is scarcely ever done, and the consequence is there are always more or less mischievous animals at large, unrestrained, thieving and committing depredations wherever the opportunity is presented. While it is

true that the good and intelligent dog, the friend and companion of man, is justly considered valuable property, which no one may wantonly kill or injure, on the other hand the vicious and thieving dog should be held as a common nuisance, which any person may abate who suffers therefrom.

For the reasons given, the cause is reversed and remanded. All concur.[1]

[1] In Hodges v. Causey, 77 Miss. 853; 26 So. 945 (1900), it is said: "The court virtually told the jury, in its modifications of plaintiff's instructions, that, if they believed defendant had warned plaintiff not to let his dogs run in his field, defendant was not liable. This was error. Notice to keep his dogs out was one fact, but not the only fact, to be considered. Notice of that sort is not conclusive. See authorities collected in paragraph 8, 49 Am. Dec. 259. When it is borne in mind of what great value some dogs are, the reasonableness of the general rule against the right to kill a mere trespassing dog is apparent. See Mullaly v. People, 86 N. Y. 365, and note, to Hamby v. Samson 40 L. R. A. (s. c. 74 N. W.). Here, at the time this English deerhound was killed, she was running through the corn rows in November, when the corn was thoroughly matured. She had done at that time no damage to the cotton. The defendant says he killed her to prevent her doing damage by knocking out cotton from the stalks. The jury should not have been told that notice was a perfect defense. All the circumstances in evidence were before them, and the reasonableness of the alleged necessity of killing the dog to save property should have been left to them, as a question of fact, under proper instructions as to the law.

The court also erred in its instruction as to the necessity of proving market value. The doctrine supported by reason and the authorities is that you may prove the market value if the dog has any, and, if not, then his "special or pecuniary value to his owner, to be ascertained by reference to his usefulness and services." Heiligmann v. Rose (Tex. Sup.) 16 S. W. 932, 13 L. R. A. 275. And it is perfectly competent to prove the pedigree, characteristics, and qualities of the dog, and then prove, by witnesses who know these things, their opinions as to the value. Bowers v. Horen (Mich.) 53 N. W. 535, 17 L. R. A. 773. And on both these propositions see, specially, the notes to Hamby v. Samson (Iowa) 67 Am. St. Rep. 292, 293 (s. c. 74 N. W. 918), with the authorities, and the other in 40 L. R. A. 515, 518 (viii.), *et seq.* (s. c. 74 S. W. 918). Judgment reversed, verdict set aside, and cause remanded for a new trial.

§ 6c.—ACCIDENTAL HARM.

HARVEY v. DUNLOP.

(Hill & Den. [N. Y.] 193.—1843.)

Trespass tried at the Washington circuit in June, 1839, before WILLARD, Ch. J. The plaintiff declared against the defendant for throwing a stone at his daughter, and putting out her eye, *per quod*, etc. Plea, the general issue, with notice of special matter. The case was this: The plaintiff's daughter (Clementine), who was about five, and the defendant, about six years of age, were associates and in the habit of playing together. In the fall of 1835 they went out to gather beechnuts, and, after being absent a few hours, returned to the plaintiff's house, both of them crying. On being asked what the matter was, the defendant stated that he had thrown a stone and killed Clementine or put out her eye. Neither of them said whether the stone was thrown by accident or design, nor did it appear from any one having personal knowledge how this was on the trial, as the plaintiff's daughter was not sworn as a witness. The eye had become incurably blind. The plaintiff had repeatedly admitted that the defendant was not to blame, though it was not shown that he could have had any knowledge on the subject save such as he obtained from the children themselves, and that the injury was accidental.

NELSON, Ch. J. I am of opinion that the grounds upon which the learned judge placed the case before the jury were correct. No case or principle can be found, or if found can be maintained, subjecting an individual to liability for an act done without fault on his part; and this was substantially the doctrine of the charge. All the cases concede that an injury arising from inevitable accident, or which in law and reason is the same thing, from an act that ordinary human care and foresight are unable to guard against, is but the misfortune of the sufferer, and lays no foundation for legal responsibility. Thus it is laid down that, "If one man has received a corporal injury from the voluntary act of another, an action of trespass lies, provided there was a neglect or want of due caution in the person who did the injury, although there was no design to injure." (Bac. Abr. tit. Trespass, D.) But if not imputable to the

neglect of the party by whom it was done, or to his want of caution, an action of trespass does not lie, although the consequences of a voluntary act. Weaver v. Ward, Hob. 134; Gibbons v. Pepper, 4 Mod. 405. It was said by DALLAS, Ch. J., in Wakeman v. Robinson, 1 Bingh. 213, "If the accident happened entirely without default on the part of the defendant, or blame imputable to him, the action does not lie;" and the same principle is recognized in Bullock v. Babcock, 3 Wend. 391.

But it is said that inasmuch as the defendant admitted the injury to have been inflicted by him, it should be presumed to have been done wrongfully or carelessly, and that the *onus* lay upon him to show the contrary. This is undoubtedly a sound general principle, and the plaintiff is entitled to the full benefit of it; but it was for the jury to determine, upon the facts and circumstances before them, whether or not the defendant was in the wrong. In order to arrive at a decision upon this question the jury had a right to take into consideration the childhood of the parties, the friendly relations existing between them, the conduct of both on their return home, but more especially the repeated admissions of the plaintiff that the defendant was not to blame. The latter fact was very material, and must and should have produced a strong impression upon the minds of the jury in the absence of the testimony of Clementine, because the natural inference to be drawn from the declarations was that the plaintiff had received the information upon which they were based from his daughter's account of the transaction, and had frankly disclosed it though the admissions operated against his own interest. These admissions, taken in connection with the other facts and circumstances in the case, were undoubtedly decisive of the true character of the transaction, and they conduct us satisfactorily to the same conclusion arrived at by the jury, that the misfortune happened without fault on either side, and that it was one of those unhappy accidents to which children of the tender age of these parties are not unfrequently exposed in their little innocent plays and amusements—a result rather to be deplored than punished.

New trial denied.

BROWN v. COLLINS.

(53 N. H. 442.—1873.)

Trespass, by Albert H. Brown against Lester Collins, to recover the value of a stone post on which was a street lamp, situated in front of his place of business in the village of Tilton. The post stood upon the plaintiff's land, but near the southerly line of the main highway leading through the village and within four feet of said line. There was nothing to indicate the line of the highway, nor any fence or other obstruction between the highway, as traveled, and the post. The highway crosses the railroad near the place of accident, and the stone post stood about fifty feet from the railroad track at the crossing. The defendant was in the highway, at or near the railroad crossing, with a pair of horses loaded with grain, going to the grist mill in Tilton village. The horses became frightened by an engine on the railroad near the crossing, and by reason thereof became unmanageable, and ran, striking the post with the end of the pole and breaking it off near the ground, destroying the lamp with the post. No other injury was done by the accident. The shock produced by the collision with the post threw the defendant from his seat in the wagon, and he struck on the ground between the horses, but suffered no injury except a slight concussion. The defendant was in the use of ordinary care and skill in managing his team, until they became frightened as aforesaid.

The foregoing facts were agreed upon for the purpose of raising the question of the right of the plaintiff to recover in this action.

DOE, J. It is agreed that the defendant was in the use of ordinary care and skill in managing his horses, until they were frightened; and that they then became unmanageable, and ran against and broke a post on the plaintiff's land. It is not explicitly stated that the defendant was without actual fault,—that he was not guilty of any malice, or unreasonable unskillfulness or negligence; but it is to be inferred that the fact was so; and we decide the case on that ground. We take the case as one where, without actual fault in the defendant, his horses broke from his control, ran away with him, went upon the plaintiff's land, and did damage there, against the will, intent and desire of the defendant.

Sir Thomas Raymond's report of Lambert & Olliot v. Bessey, T. Raym. 421, and Bessey v. Olliot & Lambert, T. Raym. 467, is, "The question was this: A gaoler takes from the bailiff a prisoner arrested by him out of the bailiff's jurisdiction, whether the gaoler be liable to an action of false imprisonment and the judges of the common pleas did all hold that he was; and of that opinion I am, for these reasons.

"1. In all civil acts, the law doth not so much regard the intent of the actor, as the loss and damage of the party suffering; and therefore Mich. 6 E. 47, a. pl. 18. *Trespass quare vi & armis clausum fregit, & herbam suam pedibus calcando consumpsit* in six acres. The defendant pleads that he hath an acre lying next the said six acres, and upon it a hedge of thorns, and he cut the thorns, and, they, *ipso invito*, fell upon the plaintiff's land, and the defendant took them off as soon as he could, which is the same trespass; and the plaintiff demurred; and adjudged for the plaintiff; for though a man doth a lawful thing, yet, if any damage do thereby befall another, he shall answer for it, if he could have avoided it. As if a man lop a tree and the boughs fall upon another, *ipso invito*, yet an action lies. If a man shoot at butts, and hurt another unawares, an action lies. I have land through which a river runs to your mill, and I lop the fallows growing upon the river side, which accidentally stop the water, so as your mill is hindered, an action lies. If I am building my own house and a piece of timber falls on my neighbor's house and breaks part of it, an action lies. If a man assault me, and I lift up my staff to defend myself, and, in lifting it up hit another, an action lies by that person, and yet I did a lawful thing. And the reason of all these cases is, because he that is damaged ought to be recompensed. But otherwise it is in criminal cases, for there *actus non facit reum nisi mens sit rea.*

"Mich. 23, Car. 1 B. R.; Stile, 72, Guilbert v. Stone. Trespass for entering his close and taking away his horse. The defendant pleads that he, for fear of his life, by threats of twelve men, went into the plaintiff's house and took the horse. The plaintiff demurred; and adjudged for the plaintiff, because threats could not excuse the defendant and make satisfaction to the plaintiff.

"Hob. 134, Weaver v. Ward. Trespass of assault and battery. The defendant pleads that he was a trained soldier in London, and he and the plaintiff were skirmishing with their company, and the defendant, with his musket, *casualiter & per infortunium & contra*

voluntatem suam in discharging of his gun hurt the plaintiff, and resolved no good plea. So here though the defendant knew not of the wrongful taking of the plaintiff, yet that will not make any recompense for the wrong the plaintiff hath sustained. But the three other judges resolved that the defendant, the gaoler, could not be charged, because he could not have notice whether the prisoner was legally arrested or not."

In Fletcher v. Rylands, L. R. 3 H. L. 330, Lord CRANWORTH said,—"in considering whether a defendant is liable to a plaintiff for a damage which plaintiff may have sustained, the question in general is not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage. This is all well explained in the old case of Lambert v. Bessey, reported by Sir Thomas Raymond (Sir T. Raym. 21). And the doctrine is founded on good sense. For when one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer."

The head-note of Weaver v. Ward, Hob. 134, is,—"If one trained soldier wound another, in skirmishing for exercise, an action of trespass will lie, unless it shall appear from the defendant's plea that he was guilty of no negligence, and that the injury was inevitable." The reason of the decision, as reported, was this: "For though it were agreed, that if men tilt or tourney in the presence of the king, or if two masters of defense playing their prizes kill one another, that this shall be no felony; or if a lunatic kill a man, or the like; because felony must be done *animo felonico;* yet in trespass, which tends only to give damages according to hurt or loss, it is not so; and therefore if a lunatic hurt a man, he shall be answerable in trespass; and therefore no man shall be excused of a trespass (for this is the nature of an excuse, and not of a justification, *prout ei bene licuit*), except it may be judged utterly without his fault; as if a man by force take my hand and strike you; or if here the defendant had said that the plaintiff ran across his piece when it was discharging; or had set forth the case with the circumstances, so as it had appeared to the court that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt."

There may be some ground to argue that "utterly without his fault," "inevitable," and "no negligence," in the sense intended in that case, mean no more than the modern phrase "ordinary and

reasonable care and prudence;" and that, in such a case, at the present time, to hold a plea good that alleges the exercise of reasonable care, without setting forth all "the circumstances" or evidence sustaining the plea would be substantially in compliance with the law of that case, due allowance being made for the difference of legal language used at different periods, and the difference in the forms of pleading. But the drift of the ancient English authorities on the law of torts seems to differ materially from the view now prevailing in this country. Formerly, in England, there seems to have been no well-defined test of an actionable tort. Defendants were often liable "because," as Raymond says, "he that is damaged ought to be recompensed;" and not because, upon some clearly stated principle of law founded on actual culpability, public policy, or natural justice, he was entitled to compensation from the defendant. The law was supposed to regard "the loss and damage of the party suffering," more than the negligence and blameworthiness of the defendant: but how much more it regarded the former than the latter, was a question not settled, and very little investigated. "The loss and damage of the party suffering," if without relief, would be a hardship to him; relief compulsorily furnished by the other party would often be a hardship to him: when and why the "loss and damage" should, and when and why they should not be transferred from one to the other, by process of law, were probably not solved in a philosophical manner. There were precedents, established upon superficial, crude and undigested notions; but no application of the general system of legal reason to this subject.

Mr. HOLMES says,—"It may safely be stated that all the more ancient examples are traceable to conceptions of a much ruder sort (than actual fault), and in modern times to more or less definitely thought-out views of public policy. The old writs in trespass did not allege, nor was it necessary to show, anything savoring of culpability. It was enough that a certain event had happened, and it was not even necessary that the act should be done intentionally, though innocently. An accidental blow was as good a cause of action as an intentional one. On the other hand, when, as in Rylands v. Fletcher, modern courts hold a man liable for the escape of water from a reservoir which he has built upon his land, or for the escape of cattle, although he is not alleged to have been negligent, they do not proceed upon the ground that there is an element of culpability in making such a reservoir, or in keeping cattle, sufficient to

charge the defendant as soon as a *damnum* occurs, but on the principle that it is politic to make those who go into extra-hazardous employments take the risk on their own shoulders." He alludes to the fact that "there is no certainty what will be thought extra-hazardous in a certain jurisdiction at a certain time," but suggests that many particular instances point to the general principle of liability for the consequences of extra-hazardous undertakings as the tacitly assumed ground of decision. (7 Am. Law Rev. 652, 653, 662; 2 Kent Com. (12th ed.) 561, n. 1; 4 id. 110 n. 1.) If the hazardous nature of things or of acts is adopted as the test, or one of the tests, and the English authorities are taken as the standard of what is to be regarded as hazardous, "it will be necessary to go to the length of saying that an owner of real property is liable for all damage resulting to his neighbor's property from anything done upon his own land" (Mellish's argument in Fletcher v. Rylands, L. R. 1 Ex. 272), and that an individual is answerable "who, for his own benefit makes an improvement on his own land, according to his best skill and diligence, and not foreseeing it will produce any injury to his neighbor, if he thereby unwittingly injure his neighbor"—(GIBBS, Ch. J., in Sutton v. Clark, 6 Taunt. 44, approved by BLACKBURN, J., in Fletcher v. Rylands, L. R. 1 Ex. 286.) If danger is adopted as a test, and the English authorities are abandoned, the fact of danger, controverted in each case, will present a question for the jury, and expand the issue of tort or no tort, into a question of reasonableness in a form much broader than has been generally used; or courts will be left to devise tests of peril, under varying influences of time and place that may not immediately produce a uniform, consistent and permanent rule.

It would seem that some of the early English decisions were based on a view as narrow as that which regards nothing but the hardship "of the party suffering;" disregards the question whether, by transferring the hardship to the other party, anything more will be done than substitute one suffering party for another; and does not consider what legal reason can be given for relieving the party who has suffered, by making another suffer the expense of his relief. For some of those decisions, better reasons may now be given than were thought of when the decisions were announced; but whether a satisfactory test of an actionable tort can be extended from the ancient authorities, and whether the few modern cases that carry out the doctrine of those authorities as far as it is carried in Fletcher

v. Rylands, 3 H. & C. 774; L. R. 1 Ex. 265; L. R. 3 H. L. 330; L. R. Phil. ed. 3 Ex. 352, can be sustained, is very doubtful. The current of American authority is very strongly against some of the leading English cases.

One of the strongest presentations of the extreme English view is by BLACKBURN, J., who says in Fletcher v. Rylands, L. R. 1 Ex. 279, 280, 281, 282,—"We think that the true rule of law is, that the person who for his own purposes brings on his lands, and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle, just. The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbor, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his property, but which he knows to be mischievous if it gets on his neighbor's, should be obliged to make good the damage, which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should, at his peril, keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this we think is established to be the law, whether the things so brought be beasts, or water, or filth or stenches. The case that has most commonly occurred, and which is most frequently to be found in the books, is as to the obligation of the owner of cattle which he has brought on his land, to prevent their escaping and doing mischief. The law, as to them, seems to be perfectly settled from early times: the owner must keep them in at his peril, or he will be answerable for the natural consequences of their escape,—that is with regard to tame beasts,—for the grass they eat and trample upon, though not

for any injury to the person of others; for our ancestors have settled that it is not the general nature of horses to kick, or bulls to gore (or he might have added, dogs to bite), but if the owner knows that the beast has a vicious propensity to attack man, he will be answerable for that too. * * * In these latter authorities (relating to animals called mischievous or ferocious), the point under consideration was damage to the person; and what was decided was, that where it was known that hurt to the person was the natural consequence of the animal being loose, the owner should be responsible in damages for such hurt, though where it was not known to be so, the owner was not responsible for such damages; but where the damage is, like eating grass or other ordinary ingredients in damage feasant, the natural consequence of the escape, the rule as to keeping in the animal is the same. * * * There does not appear to be any difference in principle between the extent of the duty cast on him who brings cattle on his land to keep them in, and the extent of the duty imposed on him who brings on his land water, filth, or stenches or any other thing, which will, if it escape, naturally do damage, to prevent their escaping and injuring his neighbor."

This seems to be substantially an adoption of the early authorities and an extension of the ancient practice of holding the defendant liable, in some cases, on the partial view that regarded the misfortune of the plaintiff upon whom a damage had fallen, and required no legal reason for transferring the damages to the defendant. The ancient rule was, that a person in whose house, or on whose land, a fire accidentally originated, which spread to his neighbor's property and destroyed it, must make good the loss. Filliter v. Phippard, 11 A. & E. N. S. 347, 354; Tubervil v. Stamp, 1 Comyns, 32; s. c., 1 Salk. 13; Com. Dig., Action upon the case for Negligence, A. 6; 1 Arch. N. P. 539; Fletcher v. Rylands, 3 T. & C. 790, 793; Russell v. Fabyan, 34 N. H. 218, 225. No inquiry was made into the reason of putting upon him his neighbor's loss as well as his own. The rule of such cases is applied, by Blackburn, to everything which a man brings on his land which will, if it escapes, naturally do damage. One result of such a doctrine is, that every one building a fire on his own hearth, for necessary purposes, with the utmost care, does so at the peril, not only of losing his own house, but of being irretrievably ruined if a spark from his chimney starts a conflagration which lays waste the neighborhood. "In conflict with the rule as laid down in the English cases, is a class of cases

in reference to damage from fire communicated from the adjoining premises. Fire, like water or steam, is likely to produce mischief if it escapes and goes beyond control; and yet it has never been held in this country that one building a fire on his own premises can be made liable if it escapes upon his neighbor's premises, and does him damage without proof of negligence." Losee v. Buchanan, 51 N. Y. 476, 487.

Everything that a man can bring on his land is capable of escaping, —against his will, and without his fault, with or without assistance, in some form, solid, liquid, or gaseous, changed or unchanged by the transforming processes of nature or art,—and of doing damage after its escape. Moreover, if there is a legal principle that makes a man liable for the natural consequences of the escape of things which he brings on his land, the application of such a principle cannot be limited to those things: it must be applied to all his acts that disturb the original order of creation; or, at least, to all things which he undertakes to possess or control anywhere, and which were not used and enjoyed in what is called the natural or primitive condition of mankind, whatever that may have been. This is going back a long way for a standard of legal rights, and adopting an arbitrary test of responsibility that confounds all degrees of danger, pays no heed to the essential elements of actual fault, puts a clog upon natural and reasonably necessary uses of matter, and tends to embarrass and obstruct much of the work which it seems to be man's duty carefully to do. The distinction made by Lord CAIRNS (Rylands v. Fletcher, L. R. 3 H. L. 330) between a natural and a non-natural use of land, if he meant anything more than the difference between a reasonable and an unreasonable one, is not established in the law. Even if the arbitrary test were applied only to things which a man brings on his land, it would still recognize the peculiar rights of savage life in a wilderness, ignore the rights growing out of a civilized state of society, and make a distinction not warranted by the enlightened spirit of the common law: it would impose a penalty upon efforts, made in a reasonable, skillful and careful manner, to rise above a condition of barbarism. It is impossible that legal principle can throw so serious an obstacle in the way of progress and improvement. Natural rights are, in general, legal rights; and the rights of civilization are, in a legal sense, as natural as any others. "Most of the rights of property, as well as of person, in the social state, are not absolute but relative" (Losee v. Buchanan, 51 N. Y.

485); and, if men ever were in any other than the social state, it is neither necessary nor expedient that they should now govern themselves on the theory that they ought to live in some other state. The common law does not usually establish tests of responsibility on any other basis than the propriety of their living in the social state, and the relative and qualified character of the rights incident to that state.

In Fletcher v. Rylands, L. R. 1 Ex. 286, 287, Mr. Justice BLACKBURN, commenting upon the remark of Mr. Baron MARTIN, "that, when damage is done to personal property, or even to the person, by collision, either upon land or at sea, there must be negligence in the party doing the damage to render him legally responsible," says, "This is no doubt true; and, as was pointed out by Mr. Mellish during his argument before us, this is not confined to cases of collision, for there are many cases in which proof of negligence is essential, as, for instance, where an unruly horse gets on the footpath of a public street and kills a passenger (Hammack v. White, 11 C. B. (N. S.) 588; 31 L. J. (C. P.) 129); or where a person in a dock is struck by the falling of a bale of cotton which the defendant's servants are lowering (Scott v. London Dock Company, 3 H. & C. 596; 35 L. J. Ex. 17, 220); and many other similar cases may be found. But we think these cases distinguishable from the present. Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger; and persons who, by the license of the owner, pass near to warehouses where goods are being raised or lowered, certainly do so subject to the inevitable risk of accident. In neither case, therefore, can they recover without proof of want of care or skill occasioning the accident; and it is believed that all the cases in which inevitable accident has been held an excuse for what, *prima facie*, was a trespass, can be explained on the same principle, viz.: that the circumstances were such as to show that the plaintiff had taken that risk upon himself." This would be authority for holding, in the present case, that the plaintiff, by having his post near the street, took upon himself the risk of its being broken by an inevitable accident, carrying a traveler off the street. But such a doctrine would open more questions, and more difficult ones, than

it would settle. At what distance from a highway would an object be near it? What part of London is not near a street? And then, as the defendant had as good a right to be at home with his horses as to be in the highway, why might not his neighbor, by electing to live in an inhabited country, as well be held to take upon himself the risk of an inevitable accident happening by reason of the country being inhabited, as to assume a highway risk by living near a road? If neighborhood is the test, who are a man's neighbors, but the whole human race? If a person, by remaining in England, is held to take upon himself one class of the inevitable dangers of that country, because he could not avoid that class by migrating to a region of solitude, why should he not, for a like reason, also be held to expose himself voluntarily to other classes of the inevitable dangers of that country? And where does this reasoning end?

It is not improbable that the rules of liability for damage done by brutes or by fire, found in the early English cases, were introduced, by sacerdotal influence, from what was supposed to be the Roman or the Hebrew Law. (7 Am. L. Rev. 652, n. 1 Domat. Civil Law, Strahan's translation, 2d ed., 304, 305, 306, 312, 313; Exodus 21:28–32, 36; 22:5, 6, 9.) It would not be singular if these rules should be spontaneously produced at a certain period in the life of any community. Where they first appeared is of little consequence in the present inquiry. They were certainly introduced in England at an immature stage of English jurisprudence, and an undeveloped state of agriculture, manufactures and commerce, when the nation had not settled down to those modern, progressive, industrial pursuits which the spirit of the common law, adapted to all conditions of society, encourages and defends. They were introduced when the development of many of the rational rules now universally recognized as principles of the common law had not been demanded by the growth of intelligence, trade and productive enterprise,—when the common law had not been set forth in the precedents as a coherent and logical system on many subjects other than the tenures of real estate. At all events, whatever may be said of the origin of those rules, to extend them, as they were extended in Rylands v. Fletcher, seems to us contrary to the analogies and the general principles of the common law, as now established. To extend them to the present case would be contrary to American authority, as well as to our understanding of legal principles.

The difficulty under which the plaintiff might labor in proving

the culpability of the defendant, which is sometimes given as a reason for imposing an absolute liability without evidence of negligence (Rixford v. Smith, 52 N. H. 355, 359), or changing the burden of proof (Lisbon v. Lyman, 49 N. H. 553, 568, 569, 574, 575), seems not to have been given in the English cases relating to damage done by brutes or fire. And however large or small the class of cases in which such a difficulty may be the foundation of a rule of law, since the difficulty has been so much reduced by the abolition of witness disabilities, the present case is not one of that class.

There are many cases where a man is held liable for taking, converting (C. R. Co. v. Foster, 51 N. H. 490) or destroying property, or doing something else, or causing it to be done, intentionally, under the claim of right, and without any actual fault. "Probably one-half of the cases, in which trepass *de bonis asportatis* is maintained, arise from a mere misapprehension of legal rights." (METCALF, J., in Stanley v. Gaylord, 1 Cush. 536, 551.) When a defendant erroneously supposed, without any fault of either party, that he had a right to do what he did, and his act, done in the assertion of his supposed right, turns out to have been an interference with the plaintiff's property, he is generally held to have assumed the risk of maintaining the right which he asserted and the responsibility of the natural consequences of his voluntary act. But when there was no fault on his part, and the damage was not caused by his voluntary and intended act, or by an act of which he knew, or ought to have known, the damage would be a necessary, probable or natural consequence; or by an act which he knew or ought to have known to be unlawful—we understand the general law to be, that he is not liable. Vincent v. Stinehour, 7 Vt. 62; Aaron v. State, 31 Ga. 167; Morris v. Platt, 32 Conn. 75; and Judge Redfield's note to that case in 4 Am. L. Reg. (N. S.) 532; Townshend on Slander, secs. 67, 88, p. 128, n. 1, 2d ed. In Brown v. Kendall, 6 Cush. 292, the defendant, having interfered to part his dog and the plaintiff's, which were fighting, in raising a stick for that purpose, accidentally struck the plaintiff and injured him. It was held, that parting the dogs was a lawful and proper act which the defendant might do by the use of proper and safe means; and that if the plaintiff's injury was caused by such an act done with due care and all proper precautions, the defendant was not liable. In the decision there is the important suggestion that some of the apparent confusion in the authorities has arisen from discussions of the question whether

a party's remedy is in trespass or case, and from the statement that when the injury comes from a direct act, trespass lies, and when the damage is consequential, case is the proper form of action,—the remark concerning the immediate effect of an act being made with reference to damage for which it is admitted there is a remedy of some kind, and on the question of the proper remedy, not on the general question of liability. Judge SHAW, delivering the opinion of the court, said,—" We think, as the result of all the authorities, the rule is correctly stated by Mr. Greenleaf, that the plaintiff must come prepared with evidence to show either that the intention was unlawful, or that the defendant was in fault; for if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be liable. 2 Greenl. Ev. secs. 85 to 92; Wakeman v. Robinson, 1 Bing. 213. If, in the prosecution of a lawful act, a casualty purely accidental arises, no action can be supported for an injury arising therefrom. Davis v. Saunders, 2 Chit. R. 639; Com. Dig. Battery, A. Day's ed. and notes; Vincent v. Stinehour, 7 Verm. 62;" James v. Campbell, 5 C. & P. 372; Alderson v. Waistell, 1 C. & K. 358.

Whatever may be the rule or the exception, or the reason of it, in cases of insanity (Weaver v. Ward, Hob. 134; Com. Dig. Battery, A. n. d, Hammond's ed.; Dormay v. Borradaile, 5 M. G. & S 380; Sedgwick on Damages, 455, 456, 2d ed.; Morse v. Crawford, 17 Vt. 499; Dickinson v. Barber, 9 Mass. 225; Krom v. Schoonmaker, 3 Barb. 647; Horner v. Marshall, 5 Munf. 466; Yeates v. Reed, 4 Blackf. 463), and whatever may be the full legal definitions of necessity, inevitable danger and unavoidable accident, the occurrence complained of in this case was one for which the defendant is not liable, unless every one is liable for all damage done by superior force overpowering him, and using him or his property as an instrument of violence. The defendant, being without fault, was as innocent as if the pole of his wagon had been hurled on the plaintiff's land by a whirlwind, or he himself, by a stronger man, had been thrown through the plaintiff's window. Upon the facts stated, taken in the sense in which we understand them, the defendant is entitled to judgment. 1 Hilliard on Torts, ch. 3, 3d ed.; Losee v. Buchanan, 51 N. Y. 476; Parrott v. Wells, 15 Wall. 524, 537; Roche v. M. G. L. Co., 5 Wis. 55; Eastman v. Co., 44 N. H. 143, 156.

Case discharged.

STANLEY v. POWELL.

(1891.—1 Q. B. 86.)

DENMAN, J. This case was tried before me and a special jury at the last Maidstone Summer Assizes.

In the statement of claim the plaintiff alleged that the defendant had negligently and wrongfully and unskillfully fired his gun and wounded the plaintiff in his eye, and that the plaintiff, in consequence, had lost his sight and suffered other damage. The defendant denied the negligence alleged. After the evidence on both sides, which was conflicting, had been heard, I left the three following questions to the jury: 1. Was the plaintiff injured by a shot from defendant's gun? 2. Was the defendant guilty of negligence in firing the charge to which that shot belonged as he did? 3. Damages.

The undisputed facts were, that on November 29, 1888, the defendant and several others were pheasant shooting in a party, some being inside and some outside of a wood which the beaters were beating. The right of shooting was in one Greenwood, who was of the party. The plaintiff was employed by Greenwood to carry cartridges and the game which might be shot. Several beaters were driving the game along a plantation of saplings toward an open drive. The plaintiff stood just outside a gate which led into a field outside the plantation, at the end of the drive. The defendant was walking along in that field a few yards from the hedge which bounded the plantation. As he was walking along a pheasant rose inside the plantation; the defendant fired one barrel at this bird, and, according to the evidence for the defendant, struck it with his first shot. There was a considerable conflict of evidence as to details; but the jury must, I think, be taken to have adopted the version of the facts sworn to by the defendant's witnesses. They swore that the bird, when struck by the first shot, began to lower and turn back toward the beaters, whereupon the defendant fired his second barrel and killed the bird, but that a shot, glancing from the bough of an oak which was in or close to the hedge, and, striking the plaintiff, must have caused the injury complained of. The oak in question, according to the defendant's evidence, was partly between the defendant and the bird when the second barrel was fired, but it

was not in a line with the plaintiff, but, on the contrary, so much out of that line that the shot must have been diverted to a considerable extent from the direction in which the gun must have been pointed in order to hit the plaintiff. The distance between the plaintiff and the defendant, in a direct line, when the second barrel was fired, was about thirty yards. The case for the plaintiff was entirely different; but I think it must be held that the jury took the defendant's account of the matter, for they found the second question left to them in the negative. Before summing up the case to the jury, I called the attention of the parties to the doctrine which seemed to have been laid down in some old cases—that, even in the absence of negligence, an action of trespass might lie; and it was agreed that I should leave the question of negligence to the jury, that, if necessary, the pleadings were deemed to have been amended so as to raise any case or defense open upon the facts with liberty to the court to draw inferences of fact, and that the damages should be assessed contingently. The jury assessed them at £100. I left either party to move the court for judgment; but it was afterward agreed that the case should be argued before myself on further consideration, and that I should give judgment, notwithstanding that I had left the parties to move the court, as though I had originally reserved it for further consideration before myself.

Having heard the arguments, I am of opinion that, by no amendment that could be made consistently with the finding of the jury could I properly give judgment for the plaintiff. It was contended on his behalf that this was a case in which an action of trespass would have lain before the Judicature Acts; and this contention was mainly founded on certain dicta which, until considered with reference to those cases in which they are uttered, seem to support the contention; but no decision was quoted, nor do I think that any can be found which goes so far as to hold, that if A. is injured by a shot from a gun fired at a bird by B., an action of trespass will necessarily lie, even though B. is proved to have fired the gun without negligence and without intending to injure the plaintiff or to shoot in his direction.

The jury having found that there was no negligence on the part of the defendant, the most favorable way in which it is now possible to put the case for the plaintiff is to consider the action as brought for a trespass, and to consider that the defendant has put upon the record a defense denying negligence, and specifically alleging the

facts, sworn to by his witnesses, which the jury must be considered to have found proved, and then to consider whether those facts, coupled with the absence of negligence established by the jury, amount to an excuse in law.

The earliest case relied upon by the plaintiff was one in the year-book 21 Hen. 7, 28 A., which is referred to by Grose, J., in the course of the argument in Leame v. Bray, 3 East, 593, to be mentioned presently, in these words: "There is a case put in the year-book, 21 Hen. 7, 28 A., that where one shot an arrow at a mark which glanced from it and struck another, it was holden to be trespass." Returning to the case in the year-book, it appears that the passage in question was a mere *dictum* of Rede, who (see 5 Foss' Lives of the Judges, p. 230) was at the time (1506) either a judge of the King's Bench or C. J. of the Common Pleas, which he became in October in that year, in a case of a very different kind from that in question, and it only amounts to a statement that an action of trespass may lie even where the act done by the defendant is unintentional. The words relied on are: "*Mes ou on tire a les buts et blesse un home, coment que est incontre sa volonte, il sera dit un trespassor incontre son entent.*" But in that very passage Rede makes observations which show that he has in his mind cases in which that which would be *prima facie* a trespass may be excused. The next case in order of date relied upon for the plaintiff was Weaver v. Ward, Hob. 134, decided in 1607. There is no doubt that that case contains dicta which *per se* would be in favor of the plaintiff, but it also contains the following summing up of the law applicable to cases of unintentional injury by acts which are *prima facie* trespasses: "Therefore, no man shall be excused of a trespass * * * except it may be judged utterly without his fault," showing clearly that there may be such cases. That case, after all, only decided that where the plaintiff and defendant were skirmishing as soldiers of the trainband and the one, "*casualiter, et per infortunium, et contra voluntatem suam*" (which must be translated "accidentally and involuntarily") shot the other, an action of trespass would lie, unless he could show that such involuntary and accidental shooting was done under such circumstances as utterly to negative negligence. Such cases may easily be supposed, in which there could be no two opinions about the matter; but other cases may, as the present case did, involve considerable conflicts of evidence and opinion which until recently a jury only could dispose of.

The case of Gibbons v. Pepper, 4 Mod. 404, decided in 1695, merely decided that a plea showing that an accident caused by a runaway horse was inevitable, was a bad plea in an action of trespass, because, if inevitable, that was a defense under the general issue. It was a mere decision on the pleading, and laid down nothing as regards the point raised in the present case. The concluding words of the judgment, which show clearly the *ratio decidendi* of that case, are these: "He should have pleaded the general issue, for if the horse ran away against his will he would have been found not guilty, because in such a case it cannot be said with any color of reason to be a battery in the rider." The more modern cases of Wakeman v. Robinson, 1 Bing. 213, and Hall v. Fearnley, 3 Q. B. 919, lay down the same rule as regards the pleading point, though the former case may also be relied upon as an authority by way of *dictum* in favor of the plaintiff, and the latter may be fairly relied upon by the defendant; for WIGHTMAN, J., in his judgment explains Wakeman v. Robinson, 1 Bing. 213, thus: "The act of the defendant" (viz., driving the cart at the very edge of a narrow pavement on which the plaintiff was walking, so as to knock the plaintiff down) "was *prima facie* unjustifiable, and required an excuse to be shown. When the motion in this case was first made, I had in my recollection the case of Wakeman v. Robinson, 1 Bing. 213. It was there agreed that an involuntary act might be a defense on the general issue. The decision indeed turned on a different point; but the general proposition is laid down. I think the omission to plead the defense here deprived the defendant of the benefit of it, and entitled the plaintiff to recover."

But in truth neither case decides whether, where an act such as discharging a gun is voluntary, but the result injurious without negligence, an action of trespass can nevertheless be supported as against a plea pleaded and proved, and which the jury find established, to the effect that there was no negligence on the part of the defendant.

The case of Underwood v. Hewson, 1 Str. 596, decided in 1724, was relied on for the plaintiff. The report is very short. "The defendant was uncocking a gun, and the plaintiff standing to see it, it went off and wounded him; and at the trial it was held that the plaintiff might maintain trespass—*Strange pro defendente.*" The marginal note in Nolan's edition of 1795, not necessarily Strange's

own composition, is this: "Trespass lies for an accidental hurt;" and in that edition there is a reference to Buller's N. P., p. 16. On referring to Buller, p. 16, where he is dealing with Weaver v. Ward, 14 Jac. 1, Hob. 134, I find he writes as follows: "So (it is not battery) if one soldier hurt another in exercise; but if he plead it he must set forth the circumstances, so as to make it appear to the court that it was inevitable, and that he committed no negligence to give occasion to the hurt, for it is not enough to say that he did it *casualiter, et per infortunium, et contra voluntatem suam;* for no man shall be excused of a trespass, unless it be justified entirely without his default (Weaver v. Ward, 14 Jac. 1, Hob. 134); and therefore it has been holden that an action lay where the plaintiff, standing by to see the defendant uncock his gun, was accidentally wounded. (Underwood v. Hewson, T. 10, Geo. 1; *per* Fortescue and Raymond in Midd., Str. 596.)" On referring back to Weaver v. Ward, 14 Jac. 1, Hob. 134, I can find nothing in the report to show that the court held, that in order to constitute a defense in the case of a trespass it is necessary to show that the act was inevitable. If inevitable, it would seem that there was a defense under the general issue; but a distinction is drawn between an act which is inevitable and an act which is excusable, and what Weaver v. Ward, 14 Jac. 1, Hob. 134, really lays down is that "no man shall be excused of a trespass except it may be judged utterly without his fault."

Day v. Edwards, 5 T. R. 648 (1794), merely decides that where a man negligently drives a cart against the plaintiff's carriage, the injury being committed by the immediate act complained of, the remedy must be trespass and not case.

But the case upon which most reliance was placed by the plaintiff's counsel was Leame v. Bray, 3 East. 593, that was an action of trespass in which the plaintiff complained that the defendant with force and arms drove and struck a chaise which he was driving on the highway, against the plaintiff's curricle, which the plaintiff's servant was driving, by means whereof the servant was thrown out, and the horses ran away, and the plaintiff, who jumped out to save his life, was injured. The facts stated in the report include a statement that "the accident happened in a dark night, owing to the defendant driving his carriage on the wrong side of the road, and the parties not being able to see each other; and that if the defendant had kept his right side there was ample room for the car-

riages to have passed without injury." The report goes on to state: "But it did not appear that blame was imputable to the defendant in any other respect as to the manner of his driving. It was therefore objected for the defendant, that the injury having happened from negligence and not willfully, the proper remedy was by an action on the case, and not of trespass *vi et armis:* and the plaintiff was thereupon nonsuited." On the argument of the rule to set aside the verdict the whole discussion turned upon the question whether the injury was, as put by LAWRENCE, J., at page 596 of the report, immediate from the defendant's act, or consequential only from it, and in the result the nonsuit was set aside. But it clearly appears from the report that there was evidence upon which the jury might have found negligence, and indeed the defendant's counsel assumed it in the very objection which prevailed with Lord ELLENBOROUGH when he nonsuited the plaintiff. There is nothing in any of the judgments to show that if in that case a plea had been pleaded denying any negligence, and the jury had found that the defendant was not guilty of any negligence, but (for instance) that the accident happened wholly through the darkness of the night making it impossible to distinguish one side of the road from the other and without negligence on either side, the court would have held that the defendant would have been liable either in trespass or in case.

All the cases to which I have referred were before the Court of Exchequer in 1875, in the case of Holmes v. Mather, (L. R., 10 Exch. 261,) and BRAMWELL, B., in giving judgment in that case, dealt with them thus: "As to the cases cited, most of them are really decisions on the form of action, whether case or trespass. The result of them is this, and it is intelligible enough: if the act that does an injury is an act of direct force *vi et armis,* trespass is the proper remedy (if there is any remedy) where the act is wrongful either as being willful or as being the result of negligence. Where the act is not wrongful for either of these reasons, no action is maintainable, though trespass would be the proper form of action if it were wrongful. That is the effect of the decisions."

This view of the older authorities is in accordance with a passage cited by Mr. Dickens from Bacon's Abridgment, "Trespass," I, page 706, with a marginal reference to Weaver v. Ward, 14 Jac. 1, Hob. 134. In Bacon the word "inevitable" does not find a place. "If the circumstances which is especially pleaded in an action of trespass do not make the act complained of lawful" (by which I

understand justifiable, even if purposely done to the extent of purposely inflicting the injury, as for instance, in a case of self-defense) "and only make it excusable, it is proper to plead this circumstance in excuse; and it is in this case necessary for the defendant to show not only that the act complained of was accidental" (by which I understand "that the injury was unintentional"), "but likewise that it was not owing to neglect or want of due caution." In the present case the plaintiff sued in respect of an injury owing to the defendant's negligence—there was no pretense for saying that it was intentional so far as any injury to the plaintiff was concerned—and the jury negatived such negligence. It was argued that nevertheless, inasmuch as the plaintiff was injured by a shot from the defendant's gun, that was an injury owing to an act of force committed by the defendant, and therefore an action would lie. I am of opinion that this is not so, and that against any statement of claim which the plaintiff could suggest the defendant must succeed if he were to plead the facts sworn to by the witnesses for the defendant in this case, and the jury believing these facts, as they must now be taken by me to have done, found the verdict which they have found as regards negligence. In other words, I am of opinion that if the case is regarded as an action on the case for an injury by negligence the plaintiff has failed to establish that which is the very gist of such an action; if, on the other hand, it is turned into an action for trespass, and the defendant is (as he must be) supposed to have pleaded a plea denying negligence and establishing that the injury was accidental in the sense above explained, the verdict of the jury is equally fatal to the action. I am therefore of opinion that I am bound to give judgment for the defendant. As to costs, they must follow unless the defendant foregoes his right.

Judgment for the defendant.

SPADE v. LYNN AND BOSTON RY.

(172 Mass. 488; 52 N. E. 747.—1899.)

HOLMES, J. This is an action for personal injuries, which already has been before the court. 168 Mass. 285. 47 N. E. 88. At the second trial the evidence was that the defendant's conductor, in removing a drunken man from a car, jostled another drunken man, who was standing in front of the plaintiff, and threw him upon her.

The fall upon her seems to have been a trifling matter, taken by itself, but the fright caused by that and the rest of the occurrences in the car resulted in physical injury. The case comes up again upon exceptions.

The judge was asked to direct a verdict for the defendant. We find some difficulty in seeing upon what ground the jury were warranted in finding for the plaintiff. So far as appears, the conductor was acting rightly in putting the drunken man off the car. As against the plaintiff, he was doing one of the things which she had to contemplate as liable to happen, when she got into the car. We all know that, if people are standing in the passageway of a street car, you cannot remove a man forcibly through the passageway, without more or less contact. If the fall upon the plaintiff was the necessary consequence of a lawful and reasonable act, then it was one of the risks which she assumed when she took her passage.

It is a question which deserves more discussion than it has received, whether a man is answerable for an injury inflicted upon an innocent stranger knowingly, or with sufficient notice of the danger, if the injury is an unavoidable incident of lawful self-protection. It might be said, and it has been held, when it is a question of paying damages, that a man cannot shift his misfortunes to his neighbor's shoulders. Gilbert v. Stone, Aleyn, 35, Style, 72; Scott v. Shepherd, 2 W. Bl. 892, 896; Cooley, Torts, p. 115. See McLeod v. Jones, 105 Mass. 403, 405; Miller v. Horton, 152 Mass. 540, 547, 26 N. E. 100; Pierce v. Steamship Co., 153 Mass. 87, 90, 26 N. E. 415; Whalley v. Railroad Co., 13 Q. B. Div. 131. And compare the rule as to duress in contracts and conveyances. Fairbanks v. Snow, 145 Mass. 153, 155, 13 N. E. 596. On the other hand, the contrary has been intimated in a case of shooting in self-defense, the injury to the third person being treated on the footing of accident. Morris v. Platt, 32 Conn. 75, 84. See Bac. Max. Reg. 5, 6; Addison, Torts (6th Ed.) 380, 383. And the right to pull down a house when the destruction is necessary to stop a fire, as it usually is stated, looks the same way. See Taylor v. Inhabitants of Plymouth, 8 Metc. (Mass.) 462, 465; Print Works v. Lawrence, 23 N. J. Law, 590, 613. The alleged immunity for the necessary destruction of a building suggests that perhaps the question cannot be answered in general terms, and that one possible distinction may be found where the parties have a common interest, even though

the act done in furtherance of it may cause more harm than good to the plaintiff. Perhaps it would be unsafe to find any countenance to such a distinction in decisions as to the rights of landowners or officials in diking against water when it appears as a common enemy. Rex v. Commissioners, 8 Barn. & C. 355; Nield v. Railway Co., L. R. 10 Exch. 4. Compare Whalley v. Railway Co., 13 Q. B. Div. 131. But when we go a step further, and take a case like the present, where all parties concerned are in a conveyance, and to maintain order and keep the car clear of obnoxious persons is the defendant's right, and its duty to the plaintiff and the other passengers, no passenger can complain of any consequence which the performance of that duty necessarily entails. We assume for present purposes that carriers of passengers owe the same degree of care in respect of such matters as they owe in respect of the construction and management of their vehicles, but if that care is shown, probably the injury must be regarded as an inevitable accident. As to whether there was any negligence in the manner of expelling the drunken man, or otherwise, we will go no further than to say that it has not been pointed out to us. We need not decide the question, as there must be a new trial for another reason.

A ruling was asked to the effect that the plaintiff could recover only for the pain and fright caused by the contact with her person, and not for such mental disturbance and injury as was caused by other acts of the conductor, and the general disturbance in the car. This was refused, and the jury were instructed that if there was a physical injury, and accompanied by it there was fright which operated to her injury in body or mind, she could recover for the damage caused by the fright, and the jury were told that they might take all that happened as one whole. The effect of the refusal and the instructions appears to us to have been that, when once a battery of the plaintiff was proved, the defendant became, or might be found, liable for all the consequences of the disturbance in the car, and of the plaintiff's fright, however caused. We do not so understand the law.

By something of an anomaly, consequences of the defendant's conduct which would not of themselves constitute a cause of action may at times enhance the damages, if the conduct has some other consequence for which an action lies. But this further liability is not for all consequences of the defendant's conduct, but for consequences of the defendant's wrong to the plaintiff. The wrong to the

plaintiff, if any, began with the battery; and it is for the consequences of the battery only that the defendant is liable, not for all the consequences of the drunken man's presence in the car, or of the defendant's attempt to remove him. We are perfectly aware of the difficulty of discriminating. But it seems quite possible in this case that the plaintiff's trouble was due, in substance, to the disturbance as a whole, although it may be that the jury would be warranted in finding that the impact upon her person gave the detonating spark, without which she would not have collapsed. It is unnecessary to express an opinion whether the evidence in this case warranted the latter finding.

We may add a word with reference to a suggestion made on behalf of the plaintiff, and having some bearing upon the eighth instruction asked, and the instructions given. It is argued that, because the conductor had known the plaintiff for several years, the defendant's obligations to her were increased, if the jury believed that she was a particularly sensitive person, and that the conductor must have known it. We regard such an argument, even to the jury, as wholly inadmissible. Ordinary street cars must be run with reference to ordinary susceptibilities, and the liability of their proprietors cannot be increased simply by a passenger's notifying the conductor that he has unstable nerves. In this case it was left to the jury to say whether there was anything that called for special attention to the plaintiff, beyond what was due to other women. Nothing is pointed out to us as a basis for such increased obligation, except the conductor's acquaintance with the plaintiff, and that laid no foundation for it.

We should add, however, to avoid being misunderstood, and with reference to the plaintiff's tenth request, that, if the defendant's servant did commit an unjustifiable battery on the plaintiff's person, the defendant must answer for the actual consequences of that wrong to her as she was, and cannot cut down her damages by showing that the effect would have been less upon a normal person. Braithwaite v. Hall, 168 Mass. 38, 40, 46 N. E. 398. The measure of the defendant's duty in determining whether a wrong has been committed is one thing; the measure of liability when a wrong has been committed is another.

Exceptions sustained.[1]

[1] In Feary v. Metropolitan St. Ry. 162 Mo. 75, 99, 62 S. W. 452, 459; the trial court charged the jury: "If you find from its evidence that the injuries

CLEVELAND CITY RY. v. OSBORN.

(66 Ohio State 45 : 63 N. E. 604.—1902.)

DAVIS, J. * * * It must be conceded that the proximate cause of the injury to the defendant in error was the sudden stopping of the car, whether the stop was caused by the act of the gripman, or by the collision, or by both together; but the plaintiff in error still is not liable if the sudden stopping or the collision was not, in a legal sense, by its fault. There is no evidence that the collision was occasioned by negligence of the plaintiff in error. The presumption which may be raised from the fact of the collision itself is negatived by the admitted circumstances. The bakery wagon was proceeding in the same direction as the train, and suddenly turned across the track, going toward Dunham avenue. The driver of the wagon was watching the east-bound train, and did not see the west-bound. He did not hear the ringing of the bells when the two trains passed each other just east of Dunham avenue. In this emergency, which unexpectedly occurred without his fault, the gripman was bound not only by the duty which he owed to the driver of the wagon, but that which he owed to the passengers behind him, to avoid a collision, if possible. With his utmost efforts, he only partially succeeded. The horse and driver escaped injury, and the wagon was slightly injured. In the effort to avert that which might have cost the life of the driver of the wagon, and perhaps serious injury to the passengers on the car, the defendant in error was, if the finding of the jury was right, thrown from the car and injured. If the gripman had not tried to avoid the collision, and the defendant in error had been injured while sitting in the car, the plaintiff in error would have been liable. Now it is claimed that because he did endeavor to avert the collision, he did it too vigorously, and that the plaintiff in error should pay for

sustained by the plaintiff were merely the result of accident, then your verdict will be for defendant." It was urged on appeal that it should have said, "inevitable or unavoidable accident." The same objection was urged to similar instructions in Sawyer v. Railroad Co., 87 Mo. 262, and in Henry v. Railway Co., 113 Mo. 555, 12 S. W. 214, and in both cases the objection was held untenable. In the last case cited, Burgess, J., said: "And we think, when used in this case, it was understood to mean that if the injury was purely accidental, and without fault on the part of defendant's servant, that it was not liable."

a result which was unusual, and which could not have been anticipated. It is true that the plaintiff in error was required to exercise toward the defendant in error, as a passenger, the highest practicable degree of care, or, to state it in another way, the highest degree of care possible under the circumstances; that we are sure that the gripman did no more than he ought to have done, and we are not able to conceive what else he could have done under the circumstances. The jury was not authorized to infer negligence from the proven facts. The judgment of the lower court presents the anomaly of requiring of one the strict performance of an act as a legal duty, yet requiring it at his peril. One cannot do right and do wrong at the same time. The injury to the defendant in error, as she puts it before the court, was a pure accident, without the elements of negligence or culpability. It is *damnum absque injuria*. It follows from what has been said that the trial judge committed an error when he refused the request of the plaintiff in error that he should instruct the jury that, under the testimony in this case, it was their duty to return a verdict for the defendant.

The judgments of the circuit court and of the common pleas are reversed, and judgment is rendered for plaintiff in error.

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§ 6D.—HARMS BY LUNATICS.

WILLIAMS v. HAYS.

(157 N. Y. 541; 52 N. E. 589.—1899.)

HAIGHT, J. This action was brought by the plaintiff, as assignee of the Phœnix Insurance Company, to recover the amount of insurance paid by the company to Parsons and Loud under a policy of insurance issued to them as the owners of one-sixteenth of the brig Emily T. Sheldon.

The brig had been wrecked on Peaked Hill Bar, on Cape Cod, near Provincetown, Mass.; and it is alleged that the loss occurred through the negligence of the defendant, who was the master and part owner of the brig, and who commanded her at the time of the loss. The plaintiff claims the right to recover in this action upon

the theory that the insurance company became subrogated to the rights of the owners, whom it had insured.

The answer denied the allegations of the complaint that the loss was caused through the negligence, carelessness, misconduct, and improper navigation of the defendant, and alleges that at the time of the wreck he was unconscious of his acts, and irresponsible therefor, and was not in a condition to navigate the brig, on account of sickness, etc. At the conclusion of the evidence, the trial court directed a verdict in favor of the plaintiff, holding that the insanity of the defendant furnished no defense. The defendant's counsel objected to the direction of the verdict, and asked to go to the jury upon the questions: "First, whether or not the defendant became insane solely in consequence of his efforts to save the vessel during the storm; second, whether the defendant became insane solely in consequence of a sickness occasioned by his efforts to save the vessel during the storm, and the quinine which was taken therefor; third, whether the mate was so cognizant of the condition of the master, of the insanity or other incompetency of the master, as to require him to take the command of the vessel away from the master; fourth, whether the mate exercised due judgment in regard to the condition of the master; fifth, whether the defendant, in consequence of his efforts to save the vessel during the storm, became mentally and physically incompetent to give the vessel any further care than he did." These requests were refused by the court, and a verdict was directed, to which rulings the defendant's counsel duly excepted.

On Thursday, the 18th day of March, 1886, the brig Emily T. Sheldon left Boothbay, Me., with a cargo of ice, bound for Annapolis, Md. At the time of sailing, the weather was fair, and remained so for about 16 hours, at which time a storm commenced, with high winds and rain, with a light snow. At the time of the commencement of the storm, the vessel was in George's Channel, and the defendant tacked to work her about, trying to find his way out, until it became practically impossible to tell where he was. He headed her in what was supposed to be the direction of Cape Cod, but, not being able to make the cape, she was hove to, to ride out the gale. This was about 4 o'clock in the afternoon of the 20th, and she remained hove to until about that time in the afternoon of the 21st, and then the defendant stood her off for what was supposed to be Cape Cod. On Monday morning, the 22d, between 4 and 5

o'clock, Thatcher Island lights were sighted by the defendant. The storm had then abated, but there was a heavy roll of the sea. The defendant then turned the vessel over to the mate, telling him to keep her by the wind until he made Cape Cod light. He then went below, and laid down upon a lounge in his cabin, but, before doing so, took 15 grains of quinine. It appears that during the storm he had had but little rest; had not gone to his berth or undressed; had eaten but little, and that for the last 48 hours he had been constantly upon deck; that he was worn out, exhausted, felt sick, and feared he was to have an attack of malaria. At about 11 o'clock, the second mate, to whom the vessel had been turned over, called the mate, saying that the vessel did not act very well. The mate then went upon deck, and about half past 11 the steward called the defendant. He was lying, dressed, upon the lounge. He did not get up at the first call, and subsequently the steward pulled him off from the lounge, in order to arouse him. He then got up, but within a few minutes was again found lying upon the lounge, and the steward went to him again, and finally succeeded in getting him up on the deck of the vessel. There are some little differences in the testimony of the witnesses in reference to the order of events thereafter occurring. According to the recollection of some of the witnesses, the captain came on deck about half past 12, after the crew had been at dinner. After he came on deck, the tug Storm King came up on their weather quarter, and said that the rudderpost of the brig was split, and asked the captain if he did not want a tow. He said that he did not; that he guessed "we are all right." The Storm King then went away, and about 1 o'clock another boat came up under the stern of the brig, and offered a tow, but was refused by the captain. McDonald, who kept the log of the vessel, testified: "After the boats went away, the vessel began to go off and come to, and she would not mind her helm at all, and the sea was edging her into the beach all the time. Then I went over, and looked over the stern, but I could see nothing. Then I got into the bowline; that is a rope with a noose in it, being around my waist; and I was let down over the stern, and I looked at the rudderpost, and it was split, but I could not tell how badly. I went back on deck, and said that the rudderpost was split, and the captain said he didn't think it was, and said, 'I can't see it, and you can't, I think.' Then I began to think there was something wrong with the captain; that he did not act as he used to. Still, I could

not see anything wrong with his manner, except when he spoke to me about the vessel; and he then told me to square the yards to see if the vessel would go off again, and we did, and she did go off, but she came right back again; and I lowered the main trysail down again, and hove the helm up again, but she did not go off; she went sideways in onto the beach, and struck," at about 2:30 o'clock. Considerable evidence was taken with reference to the condition of the captain, all of which tends to show that he staggered about the vessel, making irresponsive answers to questions, appeared to be in a dazed condition, and to be either drunk or insane. After the brig struck, a life-saving boat came alongside, and offered to take him ashore; but he refused to go, and the crew of the life boat had to remain for several hours before they finally succeeded in coaxing him to go with them. He was taken ashore, but, according to his testimony, remembers nothing that occurred until the next day. The brig became a total wreck.

This action was considered in this court on a former review (143 N. Y. 442, 38 N. E. 449), at which time the law of the case was settled, except upon two points. It was then held that the defendant, as charterer of the brig, was liable for losses which occurred through his want of care or skill in the navigation of the vessel; that he was required to exercise such care and skill as a reasonably careful and prudent owner would ordinarily give to his own vessel; and that an insane person is responsible for his torts the same as if sane. The opinion contains some comments of the judge, which have been understood as indicating an intention to do away with any distinction between misfeasance and nonfeasance, and to hold that lunatics and infants were just as liable for their failure to act as they were for their affirmative torts. But, when the judge comes to sum up the result of his examination of the authorities, he concludes by stating the rule to be that, if the defendant "caused her destruction by what in sane persons would be called willful or negligent conduct, the law holds him responsible." The final conclusion reached by the judge we accept as the law of this case. Whether a lunatic or a person mentally incapacitated should be held responsible in all instances for his nonfeasance or failure to act, we will not now stop to consider.

The judge then proceeds in his opinion to say: "If the defendant had become insane solely in consequence of his efforts to save the vessel during the storm, we would have had a different case to

deal with. He was not responsible for the storm, and, while it was raging, his efforts to save the vessel were tireless and unceasing; and, if he thus became mentally and physically incompetent to give the vessel any further care, it might be claimed that his want of care ought not to be attributed to him as a fault. In reference to such a case we do not now express any opinion. * * * If it should be found upon the new trial of this action that the defendant's mental condition was produced wholly by his efforts to save the vessel during the storm, and it should therefore be held that no fault could be attributed to him on account of what he personally did or omitted to do, then the question would still remain whether the carelessness of his mate and crew, who were his servants, could not be attributed to him, and his liability be thus based upon their carelessness." We thus have two questions presented for consideration: First, Did the defendant become mentally and physically incompetent to care for and navigate the vessel, solely in consequence of his efforts to save the vessel during the storm? And, second, if he was thus mentally and physically incapacitated, were his mate and crew guilty of negligence in not taking the command of the vessel, and procuring a tow?

Upon directing a verdict in favor of the plaintiff, the trial court said: "Assuming, as we must, for such purpose, that the condition of the defendant was the result of exhaustion, caused by his efforts to save the ship from the perils of the storm, and the heavy dose of quinine which he took as a remedy, I fail to see how that presents any exception to the principle laid down by the court of appeals, that a person of unsound mind is responsible for the consequences of acts which in the case of a sane person would be negligent. In other words, the standard by which he is to be judged is the same as that which must be applied to the actions of a sane person. It certainly seems to be a cruel doctrine; but as it is apparently based upon the principle that, as between two innocent persons, the loss must fall upon him who caused it, rather than upon the other, the best that can be said about it is that it is a rule which serves the convenience of the public, to which individual rights must give way." It will thus be observed that the case was disposed of below upon the ground that the defendant was liable even though assuming that his condition was the result of exhaustion caused by his efforts to save the ship from the perils of the storm, and the question as to whether the mate was guilty of negligence was not con-

sidered. The appellate division has affirmed, following in its opinion, the reasoning of the trial judge.

We cannot give our assent to such a view of the law. To our minds it is carrying the law of negligence to a point which is unreasonable, and, prior to this case, unheard of, and is establishing a doctrine abhorrent to all principles of equity and justice. In this case, as we have seen, the storm commenced on Friday, continued through Saturday and Sunday, and it was not until 5 o'clock Monday morning that the defendant was relieved from the care of his vessel. For three days and nights he had been upon duty almost continuously, and for the last 48 hours had not been below the deck. The man is not yet born in whom there is not a limit to his physical and mental endurance, and, when that limit has been passed, he must yield to laws over which man has no control. When the case was here before, it was said that the defendant was bound to exercise such reasonable care and prudence as a careful and prudent man would ordinarily give to his own vessel. What careful and prudent man could do more than to care for his vessel until overcome by physical and mental exhaustion? To do more was impossible. And yet we are told that he must, or be responsible. Among the familiar legal maxims are the following: The law intends what is agreeable to reason; it does not suffer an absurdity. Impossibility is an excuse in law, and there is no obligation to perform impossible things. Co. Litt. 78; 9 Coke, 22; Co. Litt. 29; 1 Poth. Obl. pt. 1, c. 1, s. 4, § 3. Applying these maxims to the case under consideration, we think the fallacy of the reasoning below is apparent, and that it cannot and ought not to be sustained.

As to whether the mate should be chargeable with negligence is a question which has not as yet been determined. It is said that he did nothing to save the vessel. It appears that he was on deck, obeying the orders of the captain. The circumstances surrounding him were peculiar. Possibly he might have put the captain in irons, and taken the command of the vessel, but mutiny at sea is criminal, and heavily punished. In order to justify such action, he must be satisfied of the derangement of his superior officer, and be able to command the assistance of the crew. Whether the condition of the captain was so apparent at the time as to charge the mate with negligence in not resorting to strong measures, we think, was a question of fact for the determination of the jury, and that it was

not within the province of the court to dispose of it as a question of law.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

BARTLETT, J. (dissenting). I am of opinion there was no question for the jury in this case. The learned counsel for the defendant asked to go to the jury on two questions:

First. "Whether or not the defendant became insane solely in consequence of his effort to save the vessel during the storm." It is true that Judge EARL, writing in this case for the court on the former appeal, stated that, if the defendant had become insane solely in consequence of his efforts to save the vessel during the storm, we would have had a different case to deal with. It is, however, undisputed that the record now before us is identical in all essential respects with the one then under examination, and it therefore follows that the determination of this court that the insanity of the defendant was no defense is the law of this case, and was properly followed by the trial judge when he directed a verdict for the plaintiff.

Second. "Whether the defendant became insane solely in consequence of a sickness occasioned by his efforts to save the vessel during the storm, and the quinine which was taken therefor." Judge EARL stated in his opinion upon the former appeal that if it were found upon a new trial that the defendant's mental condition was produced wholly by his efforts to save the vessel during the storm, and it should therefore be held that no fault could be attributed to him on account of what he personally did, or omitted to do, then the question would still remain whether the carelessness of his mates and crew, who were his servants, could not be attributed to him, and his liability be thus based upon their failure to act. There is no conflict of evidence on this latter point, and only a question of law is presented to this court on undisputed facts,—Whether the captain was not liable for this loss, not only on account of his insanity, but for the reason that the mates and crew, having full knowledge of the captain's mental incapacity, and that the rudder was useless, failed to intervene and save the vessel, but allowed her to drift with the dead swell upon the beach, with all sails set and no anchors out, in a light wind blowing off shore, in the middle of a pleasant afternoon, with two steam tugs lying by, and offering

a tow to a port nine miles distant. There was no request to go to the jury as to the conduct of the crew. The liability of the captain for the acts of his mates and crew is well settled. Story on Agency (section 314) states: "The policy of the maritime law, has therefore indissolubly connected his (the master's) personal responsibility with that of all the other persons on board, who are under his command, and are subjected to his authority." With the same record before us as on the former appeal, I am unable to understand why the former decision of this court should not be followed. 143 N. Y. 442, 38 N. E. 449.[1] I vote for affirmance.

All concur with HAIGHT, J., for reversal, except BARTLETT, J., who reads for affirmance.

Judgment reversed, etc.

[1] In the opinion of the court, in 143 N. Y. 442, it is said: "The important question for us to determine, then, is whether the insanity of the defendant furnishes a defense to the plaintiff's claim, and I think it does not. The general rule is that an insane person is just as responsible for his torts as a sane person, and the rule applies to all torts, except, perhaps, those in which malice, and therefore intention, actual or imputed, is a necessary ingredient, like libel, slander, and malicious prosecution. In all other torts, intention is not an ingredient, and the actor is responsible, although he acted with a good and even laudable purpose, without any malice. The law looks to the person damaged by another, and seeks to make him whole, without reference to the purpose or the condition, mental or physical, of the person causing the damage. The liability of a lunatic for his torts, in the opinion of judges, has been placed upon several grounds. The rule has been invoked that, where one of two innocent persons must bear a loss, he must bear it whose act caused it. It is said that public policy requires the enforcement of the liability, that the relatives of a lunatic may be under inducement to restrain him, and that tort feasors may not simulate or pretend insanity to defend their wrongful acts, causing damage to others. The lunatic must bear the loss occasioned by his torts, as he bears his other misfortunes, and the burden of such loss may not be put upon others. After quoting from several text-writers, in support of the rule above stated, the court adds: "The doctrine of these authorities is illustrated in many interesting cases. Bullock v. Babcock, 3 Wend. 391; Hartfield v. Roper, 21 Wend. 615; Krom v. Schoonmaker, 3 Barb. 647; Conklin v. Thompson, 29 Barb. 218; Cross v. Kent, 32 Md. 581; Neal v. Gillett, 23 Conn. 437; Huchting v. Engel, 17 Wis. 230; Brown v. Howe, 9 Gray, 84; Morain v. Devlin, 132 Mass. 87; Beals v. See, 10 Pa. St. 56; Humphrey v. Douglass, 10 Vt. 71; Morse v. Crawford, 17 Vt. 499; Cross v. Andrews, Cro. Eliz. 622; Jennings v. Rundall, 8 Term R. 336."

§ 7.—CONFLICTING RIGHTS. (A.) LANDOWNERS.

LETTS v. KESSLER.

(54 Ohio State 73; 42 N. E. 765.—1896.)

BURKET, J. The only question in this case arises upon the following findings of fact by the circuit court: "Said structure was erected upon the land of the defendant, and belonged to him. The structure was erected by said defendant from motives of unmixed malice towards said plaintiff, and for no useful or ornamental purposes of the property of said defendant." It is not claimed that the person of the plaintiff was interfered with in this case, so that we have for consideration only the rights of property.

The fence complained of is upon the land of the defendant, and belongs to him. Plaintiff fails to aver, and the court fails to find, that she has any right to or upon the lot of defendant below by contract, statute, or any other way known to the law for acquiring a right to, in, or upon lands, unless such right may be acquired by, and transferred to her, by means of the aforesaid "motives of unmixed malice." This is a manner of acquiring, on the one hand, and of transferring on the other, a right to property unknown to the law. But it is urged in her behalf that even if she had no right of property, and even if he was the owner of the lot, he could not use his own land for the purpose of erecting structures thereon which subserve no useful or ornamental purpose, and are erected through motives of unmixed malice towards his adjoining neighbor. It is and must be conceded that he might, by erecting a building on his lot, shut off her light and air to exactly the same extent as is done by this fence, and that in such case she would be without right and without remedy, even though done with the same feelings of malice as induced him to erect the fence; thus making his acts lawful when the malice is seasoned with profit, or some show of profit, to himself, and unlawful when his malice is unmixed with profit, the injury or inconvenience to her meanwhile remaining the same in both cases. If, through feelings of malice, he desires to shut the light and air from her windows, it is nothing to her whether he makes a profit or loss thereby. Her injury is no greater and no less in the one case than in the other. As to her it is the effect of the

act, and not the motive. In effect, he has the right to shut off the light and air from her windows by a building on his own premises; and she is not, in effect, concerned in the means by which such effect is produced, whether by a building or other structure; nor is she concerned as to the motive, nor as to whether he makes or loses by the operation. In the one case she might have a strong suspicion of his malice, while in the other such suspicion would be reduced to a certainty. But this is nothing to her as affecting a property right. As long as he keeps on his own property, and causes an effect on her property which he has a right to cause, she has no legal right to complain as to the manner in which the effect is produced; and to permit her to do so would not be enforcing a right of property, but a rule of morals. It would be controlling and directing his moral conduct by a suit in equity,—by an injunction.

To permit a man to cause a certain injurious effect upon the premises of his neighbor by the erection of a structure on his own premises if such structure is beneficial or ornamental, and to prohibit him from causing the same effect in case the structure is neither beneficial nor ornamental, but erected from motives of pure malice, is not protecting a legal right, but is controlling his moral conduct. In this state a man is free to direct his moral conduct as he pleases, in so far as he is not restrained by statute. But it is said that such acts are offensive to the principles of equity. Not so. There is no conflict between law and equity in our practice, and what a man may lawfully do cannot be prohibited as inequitable. It may be immoral, and shock our notions of fairness, but what the law permits equity tolerates. It would be much more inequitable and intolerable to allow a man's neighbors to question his motives every time that he should undertake to erect a structure upon his own premises, and drag him before a court of equity to ascertain whether he is about to erect the structure for ornament or profit, or through motives of unmixed malice.

The case is not like annoying a neighbor by means of causing smoke, gas, noisome smells, or noises to enter his premises, thereby causing injury. In such cases something is produced on one's premises, and conveyed to the premises of another; but in this case nothing is sent, but the air and light are withheld. A man may be compelled to keep his gas, smoke, odors, and noise at home, but he cannot be compelled to send his light and air abroad. Mullen v. Stricker, 19 Ohio St. 135. If smoke, gas, offensive odors, or noise

pass from one's own premises to or upon the premises of another, to his injury, an action will lie therefor, even though the smoke, gas, odor, or noise should be caused by the lawful business operations of defendant, and with the best of motives. Broom, Leg. Max. 372. In such cases it is the effect or injury, and not the motive, that is regarded. The true test is whether anything recognized by law as injurious passes from the premises of one neighbor to that of another. Anything so passing invades the legal rights of him whose premises it reaches, and such rights will be protected. But courts cannot regulate or control the moral conduct of a man, unless authorized so to do by statute.

The following cases, cited by plaintiff in error, bear more or less upon the question involved in this case, and seem to produce a decided weight of authority in his favor: Frazier v. Brown, 12 Ohio St. 294; Falloon v. Schilling, 29 Kan. 292; Mahan v. Brown, 13 Wend. 261; Greenleaf v. Francis, 18 Pick. 123; Chatfield v. Wilson, 28 Vt. 49. The following additional authorities are to the same effect: Gould, Waters, § 280, citing: Chasemore v. Richards, 7 H. L. Cas. 349; Dickinson v. Canal Co., 7 Exch. 282; Acton v. Blundell, 12 Mees. & W. 324; Hammond v. Hall, 10 Sim. 552; Cooper v. Barber, 3 Taunt. 99; Balston v. Bensted, 1 Camp. 463; Galgay v. Railway Co., 4 Ir. C. L. 456; Chase v. Silverstone, 62 Me. 175; Roath v. Driscoll, 20 Conn. 533; Brown v. Illius, 27 Conn. 84; Ocean Grove Camp Meeting Ass'n v. Asbury Park Com'rs, 40 N. J. Eq. 447, 3 Atl. 168; Taylor v. Fickas, 64 Ind. 167; Village of Delhi v. Youmans, 45 N. Y. 362; Dexter v. Aqueduct Co., 1 Story, 387, Fed. Cas. No. 3,864; Wheatly v. Baugh, 25 Pa. St. 528, 64 Am. Dec. 721, note; Haugh's Appeal, 102 Pa. St. 42, 48 Am. Rep. 193, note; Haldeman v. Bruckhart, 45 Pa. St. 514; Coleman v. Chadwick, 80 Pa. St. 81; Trout v. McDonald, 83 Pa. St. 146; Lybe's Appeal, 106 Pa. St. 626; Smith v. Adams, 6 Paige, 435; Elster v. Springfield, 49 Ohio St. 82, 30 N. E. 274; Ellis v. Duncan, cited in 29 N. Y. 466; Radcliff v. Mayor, etc., 4 N. Y. 195, 200; Pixley v. Clark, 35 N. Y. 520; Goodale v. Tuttle, 29 N. Y. 466; Bliss v. Greeley, 45 N. Y. 671; Clark v. Conroe, 38 Vt. 469; Taylor v. Welch, 6 Or. 198; Mosier v. Caldwell, 7 Nev. 363; Railway Co. v. Peterson, 14 Ind. 112; Bassett v. Manufacturing Co., 43 N. H. 573; 30 Cent. Law. J. 269; 23 Am. Law Rev. 376; Davis v. Afong, 5 Hawaii, 216.

The defendant in error cites the cases reviewed in Frazier v. Brown, 12 Ohio St. 294, and also the case of Burke v. Smith, 69

Mich. 395, 37 N. W. 838. Most of the cases cited are cases arising out of interference with wells, springs, and percolating waters. Such cases bear but slightly upon the question. The Michigan case is substantially like the case under consideration. In that case the lower court enjoined the defendant, and that judgment was affirmed by an equally divided court. The syllabus says that, the court being equally divided, nothing is decided. As nothing was decided, the case is not an authority on either side of the question.

But it is strongly urged by counsel for defendant in error that the maxim, "Enjoy your own property in such a manner as not to injure that of another person," applies in such cases as this, and that, as it must be conceded that the fence in question is an injury to the property of defendant in error, his acts are in conflict with the above maxim. At first blush, this would seem to be so, but a careful consideration shows the contrary. The maxim is a very old one, and states the law too broadly. In this case, for instance, it is conceded that the plaintiff in error had the right to enjoy his property by erecting a house so as to do the same injury which was done by the fence, and that while that would be an injury to the property of defendant in error, she would be without remedy, and his act in erecting such house would not be regarded as violating the maxim. In Jeffries v. Williams, 5 Exch. 797 it was claimed, and in Railroad Co. v. Bingham, 29 Ohio St. 369, it was held, that the true and legal meaning of the maxim is, "So use your own property as not to injure the rights of another." Boynton, J., in that case says: "Where no right has been invaded, although one may have injured another, no liability has been incurred. Any other rule would be manifestly wrong." The maxim should be limited to causing injury to the rights of another, rather than to the property of another, because for an injury to the rights of another there is always a remedy; but there may be injuries to the property of another for which there is no remedy, as in draining a spring or well, or cutting off light and air or a pleasant view by the erection of buildings, and many other cases which might be cited. Thus limiting the maxim to the rights of the defendant in error, it is plain that the acts of plaintiff in error in the use which he made of his property did not injure any legal right of hers, and that, therefore, what he did was not in violation of such maxim.

The circuit court erred in overruling the demurrer to the petition, and in rendering judgment in favor of defendant in error upon the

facts as found by the court. The judgment of the circuit court is therefore reversed, and, proceeding to render such judgment as the circuit court should have rendered upon the facts found, the petition of plaintiff below is dismissed, at her cost.

Judgment reversed.[1]

PIXLEY v. CLARK.

(35 N. Y. 520.—1866.)

PECKHAM, J. Action for damage for flooding plaintiff's land. The defendants purchased of the plaintiff a small strip of land on the borders of the Oriskany creek, in Oneida county. The whole strip so purchased they occupied by an embankment on that side of the creek, considerably higher than the natural bank, to prevent the overflow of the water caused by raising their dam. They raised their dam at four different times from 1853 to 1857 inclusive, in all fifty-eight and a half inches, so that the dam was then between nine and ten feet high. The embankment was some forty feet at the base, in and prior to 1857. The plaintiff owned sixteen acres of valuable land adjoining said embankment. Prior to 1857 it was dry, and bore good crops of almost any kind. In and after 1857, by this raising of the defendant's dam, this land became saturated with water and nearly worthless. From 1857, this lot, with the exception of a few knolls, "was saturated with water at all seasons." "It had become so saturated with water that no crops could be raised there," except on a "few little knolls near a blind-ditch made by plaintiff in 1856, where there was a strip as dry as formerly." That, on the rest of the lot, cat-tails and the coarse, wild grass of the marshes grew where formerly were the dryest places. In 1858 the dam was drawn off for repairs, and so remained for

[1] In some states, statutes prohibit the erection of fences, or other structures by the landowner for the malicious purpose of annoying his neighbor. See Ridehout v. Knox, 148 Mass. 368, 19 N. E. 390 (1888); Smith v. Morse, 148 Mass. 407, 19 N. E. 393 (1888); Lord v. Langdon, 91 Me. 221, 39 At. 552 (1898); Karasek v. Peier, 22 Wash. 4, 19, 61 Pac. 33 (1900). The tendency appears to be towards a strict construction of such a statute. In Brostrom v. Lauppe, 179 Mass. 315, 60 N. E. 785 (1901), it was held not applicable to a fence located wholly on defendant's land, from three to ten feet from the line.

two or three days, and then this land became comparatively dry. The water fell, in a hole dug on it, from twenty to twenty-four inches.

It was proved on the trial that the embankment was well made, and no signs of wet on its outside appeared. From these facts the judge held that the water must have gone through the natural earth in the creek into this land, and not through the embankment, or between it and the natural soil, and nonsuited the plaintiff. On appeal, that nonsuit was sustained by the General Term in the fifth district, and plaintiff appealed to this court.

The single question presented on these facts is, whether the defendants had a right, by raising their dam, to "drown" the plaintiff's sixteen acres of land, by pressing the water through the natural banks of the stream, or otherwise. If he had, the nonsuit was right—if not, it was erroneous.

The general rule as to flowing or drowning lands is well settled. "If riparian proprietors use a water-course in such a manner as to inundate or overflow the lands of another, an action will lie, on the principle, *sic utere tuo ut alienum non laedas.*" So, if he drown the land of another and rot his grass, an action lies (Angell on Water-Courses, sec. 330); and he adds: "The law on this subject, as thus laid down, is so well settled and so obviously just, as never to have been called in question." Again he says, that "no single proprietor, without consent, has a right to make use of the flow in such a manner as will be to the prejudice of any other." (Id., sec. 340.)

Washburn on Easements reiterates this doctrine. He says, on authority of cases cited, "that a man may not erect his dam so high as to set back water beyond his neighbor's line, in its natural and ordinary swellings, in some seasons of the year." "A flood" (not the high water of spring or fall) "is a different thing: when it does come, it is a visitation of Providence, and the destruction it brings must be borne by those on whom it happens to fall" (Washb. on Ease., ch. 3, sec. 13, p. 259); and he adds, on the authority of Rex v. Trafford, 1 Barn. & Ad. 259, which sustains him, "that no man may change or obstruct the flow of water of a stream for his own benefit to the injury of another," without being liable to an action; and see 3 Kent, 5th ed. 439, 440, to the same effect; and see Browie v. The Cayuga & Susquehanna Railroad Company, 2 Kern. 486; Williams v. Nelson, 23 Pick, 142, per SHAW, Ch. J. Upon this

conceded principle of law, the plaintiff may rest his case. The defendants have so raised the water and set it back as to substantially drown or inundate the plaintiff's land. They have so obstructed the stream as to seriously injure the sixteen acres of the plaintiff's land. This action will lie, then, unless defendants can show some exception to the general rule. The burden thereof rests upon them. The defendants answer, first, that a man may do a great many things on his own land that may result in damages to his neighbor, without being liable to an action therefor, and cite Radcliff v. Brooklyn, 4 Comst. 195, where Judge BRONSON, after deciding the case before him, assumed to state what a man might do on his own land without being answerable for the consequences. But he did not say that an act of the kind complained of here was not actionable. He says: "Building a dam on one's own land, which throws back the water on the land of one higher up the stream, is an actionable injury." (p. 199.) That case, and every illustration in it, may be assented to without impairing the right to maintain this action.

The defendants' counsel says that the defendants had the right to build this dam to use their water-power, "and all that can be legally required of them is that they shall exercise it so as not to injure, directly or unnecessarily, the lands of their neighbor;" also, he says that "if one do a lawful act on his own premises, he cannot be held for the injurious consequences, unless it was so done as to constitute actionable negligence." These, like many general propositions, are plausible; but, as applied to this case, in the sense they are sought to be used, neither of them is law, and never was. Take the first: is any such principle found in any case, or stated by any elementary writer, as that you have a right to use your water-power, and build a dam for that purpose, and, if necessary to that end, you may flow and drown your neighbor's land, provided you do not do so "unnecessarily"? That you may do it, so far as is necessary to the full and profitable enjoyment of your water-power, even though you flow and destroy his farm?

The other proposition is very similar. Was it ever held or pretended that you might build a dam and flow another's land, provided you were guilty of no want of care or skill in its construction? In fact, the better dam you make—the more skillful and perfect its construction—the more water you restrain and throw back—the greater the damage to the adjoining landowner. These are sound maxims, applied to many cases, but not to all. The latter may be

admitted and applied here. The act of the defendants was lawful, in building their dam, so long as they did not injure their neighbor's land. The moment they so interfered by their dam as to flow his land to his injury, the act was unlawful. Did any declaration ever aver that the defendant, in building his dam, "unnecessarily" threw the water into plaintiff's land, or that he did so by carelessly or negligently constructing his dam? No such precedent can be found. The complaint in this case contains no such allegation.

The contrary of these propositions is decided in this court in Tremain v. Cohoes Company, 2 Comst. 163, where defendants dug a canal on their own land, and, in doing it, blasted the rocks so as to cast the fragments against plaintiff's house on contiguous grounds. In an action for that injury, this court held that evidence that work was done in the most careful manner was inadmissible. In Hay v. Cohoes Company, 2 Comst. 159, involving a similar principle, Judge Gardiner, in delivering the unanimous opinion of the court, says: "A man may excavate a canal, but he cannot cast the dirt or stones upon the land of his neighbor, either by human agency or the force of gunpowder. If he cannot construct the work without the adoption of such means, he must abandon that mode of using his property, or be held responsible for all damages resulting therefrom. He will not be permitted to accomplish a legal act in an unlawful manner." So, in Bellinger v. New York Central Railroad Company, 23 N. Y. 42, this court held (DENIO, J., delivering the opinion) "that the maxim, *aqua currit et debet currere*, absolutely prohibits an individual from interfering with the natural flow of water to the prejudice of another riparian owner upon any pretense, and subjects him to damages at the suit of any party injured, without regard to any question of negligence or want of care. If one chooses, of his own authority, to interfere with a watercourse, even upon his own land, he, as a general rule, does it at his peril, as respects other riparian owners above and below. But the rule is different where one acts under authority of law." It is not true, then, that the defendant must have "carelessly" or "unnecessarily" injured the plaintiff to enable the plaintiff to sustain this action.

There is a class of cases, however, in reference to surface streams, where negligence is the foundation of the action; as where a riparian owner erects a dam, so carelessly or unskillfully that it is

carried away, and owners below are thereby injured. The Mayor of New York v. Mailey, 2 Denio, 433. In such case, the riparian owner is held liable, unless the flood that carried it away should be regarded, substantially, as the act of Providence. The dam ought to be so constructed as "to resist such extraordinary floods as might be reasonably expected to occasionally occur;" otherwise, those erecting it are liable. And see The Inhabitants of China v. Southwick, 12 Maine, 238. But, as already seen, such a rule has no application to the case at bar.

It is, perhaps, not profitable to follow the counsel in his illustrations of the rights of landowners, as to other than water-rights. They are not pertinent, and their discussion may tend to confuse rather than enlighten the case before us.

The law as to surface streams, though peculiar, has been so frequently considered, and so carefully and fully adjudicated, that it requires no borrowed light to determine its controlling principles. One of its settled maxims, derived *ex jure naturæ*, is, *aqua currit et debet currere ut currere solebat.* It is declared by Kent to be the settled language of the law. 3 Kent, 4th ed. 439, and cases there cited; and see Angell on Water-Courses, sec. 95, etc. In this principle all writers and authorities concur. See Tyler v. Wilkinson, 4 Mason, 400. Another maxim, flowing from the one above stated, is, that the owner of the bed of the stream does not own the water, but he only has a mere right to its use. He has a mere usufruct. He cannot detain it so as to deprive an owner below of its use (Merritt v. Brinkerhoff, 17 Johns. 306), as one mill-owner on a stream has the same right as another to its reasonable enjoyment, unless one has acquired a superior right by grant or prescription. As between two mill-owners, the question sometimes arises as to a reasonable use or detention of the water by the upper mill. As each riparian owner can only use the water, and does not own it, it follows that each, as against the other, must use it reasonably. If he do otherwise, and detain it unreasonably long, to the injury of the owner below, an action lies. (Wash. on Ease., 261, sec. 16.)

The defendants insist that they are not responsible where the damages are "casual, indirect and remote," and four cases are cited to sustain the proposition. One of them is Smith v. Agawam Canal, 2 Allen, 378. This was an action for damages to plaintiff's mills, caused by the water thrown back upon them from the defendant's dam. It was admitted in the opening that "When the water

is unaffected by ice and freshets it does not, in any manner, affect the plaintiff's mills." On such occasions, the water and ice set back on him longer than it did before. The rights of parties in Massachusetts, as to the erection of dams, are regulated by statute. After alluding to this, and to the language of the judges in two other cases, Mr. Justice MERRICK, in delivering the opinion of the court, said, that "the top of the defendant's dam was lower than the lower part of the plaintiff's wheel. From these facts it is a necessary consequence that if the plaintiff sustained any damage by the rise of water, it must have been owing to the occurrence of freshets and extraordinary floods." For the results of such causes, the defendants were held not responsible. Their dam was so constructed that, without the intervention "of forces, casual and extraordinary," no possible injury could have occurred to the plaintiff. If this damage occurred in ordinary stages of the water, the liability is admitted.

Another case was Inhabitants of China v. Southwick, 12 Maine, 238. Action for carrying off plaintiffs' bridge by the erection of defendants'-dam. The jury found, under the charge of the judge, that the dam was not high enough to flow the plaintiff's bridge, or to do damage thereto. Verdict for defendant, which the court sustained. The court remarked that the dam may have contributed to the injury, but it would be going too far "to run up a succession of causes and hold each responsible for what followed, especially when the succession was casual and unexpected as it was here." It was proved that the dam had been in that condition for a series of years, without flowing the plaintiffs' bridge or doing it any damage. It was plainly the case of an extraordinary flood. The other case was Monongahela Navigation Co. v. Coon, 6 Barr. 379. Action for flowing plaintiffs' mills by the erection of defendants' dam. The defendants were held liable for the injury, under an accepted amendment to their charter, for damages sustained by plaintiffs' mills by a flood, although the court remarked that a riparian owner would not be liable for damages occasioned by floods, though the damages were increased by the dam in connection with the flood, if the dam did not flow the mill at other times.

The soundness of these decisions it is not necessary to discuss, as they have no application. The damage in the case at bar occurs, not "casually," but all seasons of the year; in the summer work-

ing season, as well as others; nor is it caused by extraordinary floods.

Again, the defendants insist that the laws of surface streams do not apply to water circulating or percolating through the natural soil under the surface of the earth. The nonsuit was placed on this ground. No one disputes this, as an abstract proposition. But that does not aid the defendants. They must show that the rule applies the other way—that is, that the rules applicable to subterranean water apply also to living surface streams. That, they will fail to establish.

An owner of the land may divert percolating water, consume or cut it off, with impunity. It is the same as land, and cannot be distinguished in law from land. So the owner of the land is the absolute owner of the soil and of the percolating water, which is a part of, and not different from, the soil. No action lies against the owner for interfering with or destroying percolating or circulating water under the earth's surface. But the difficulty is the defendants are not sued for interfering with or cutting off percolating water.

The first and leading case is Acton v. Blundell, in the Exchequer Chamber, 12 Mees. & Wels. 324. There the plaintiff had sunk a well on his own land, for raising water for the working of his mill. The defendants afterward sunk a coal-pit on their own land, whereby the plaintiff's well was made dry. *Held*, that they incurred no liability to the plaintiff thereby; that the law as to surface streams did not apply. The court stated that there was a great difference in the cases. "In surface streams, the owner merely transmits the water over its surface. He receives as much from his higher neighbor as he transmits to his neighbor below. The level of the water remains the same. But if the man who sinks the well in his own land can acquire, by that act, an absolute right to the water that collects in it, he has the power of preventing his neighbor from making any use of the spring in his own soil which shall interfere with the enjoyment of the well. He has the power, also, of debarring the owner of the land in which the spring is first found from draining his land for the proper cultivation of the soil." And the court expressly say, that, "if the right to the enjoyment of underground springs, or to a well supplied thereby, is to be governed by the same law (as the right to surface streams), then, undoubtedly,

the defendants could not justify the sinking of the coal-pits, and the action would lie."

Roath v. Driscoll, 20 Conn. 533, is another case of precisely the same character—wells sunk on each farm—and the like decision on like grounds. Martin v. Riddle, 2 Casey Penn. 415, in note, was simply an action against a party for stopping up a water-course, where plaintiff recovered—a *nisi prius* case; and the only remark touching this subject in the charge of the judge is, "that a party cannot justify the erection of an embankment to stop the water, if thereby the water is improperly forced upon another owner." Broadbent v. Ramsbotham, 34 Eng. Law. & Eq. 553, and Rawstron v. Taylor, 33 id. 428, simply hold, in substance, that an owner is not liable for the proper agricultural draining of his own land, although it may reduce the supply of a stream where plaintiff's mill was situated, provided such draining took away no water after it had reached a surface stream; that he could not divert the water "after it had arrived at, or was flowing into, some natural channel already formed." Goodale v. Tuttle, 29 N. Y. 459, is to the same general effect. The court here again remark, that the principle which governs the obstruction of running streams does not apply to waters running under the soil. Chatfield v. Wilson, 28 Verm. 49, and Chasemore v. Richards, 7 House of Lords Cases, 349, are to the same effect. In the cases last cited, it was expressly found, as a fact, that the act complained of (diverting the supplies to the river Wandle) "did not divert or abstract any water which had already joined the river Wandle, or which had already joined any surface stream running into it." Hence, the action did not lie. These actions were all for digging drains, sinking wells or pits, or making other improvements on their owners' lands, whereby water, percolating under the earth's surface was interfered with to the damage of some other proprietor of other lands. In Dickinson v. Canal Company, 7 Exch. 282, decided since Acton v. Blundell, *supra*, it was expressly decided that sinking a well, and pumping thereout large quantities of water to supply the canal, whereby water that had already reached a surface stream was diverted by percolation, was actionable by the party on the stream. In Chatfield v. Wilson, *supra*, cited by defendants, the court, after citing Acton v. Blundell, and other like cases, remarked that the case of Dickinson v. Canal Company, *supra*, "is not opposed to the views taken in the foregoing cases. In that case the injury complained of was the diminution

of water in the surface stream; and the law applicable to surface streams was applied. It was treated as a diversion of surface water, and actionable at common law." Surely, if you cannot subtract or divert the water of a surface stream to the injury of a riparian owner, even by percolation, caused by a well on your own land, you will be liable to your neighbor for your direct interference with a surface stream, whereby he is injured by percolation you have yourself unlawfully created. In Cooper v. Barber, 3 Taunt. 99, the plaintiff had diverted the water of a surface stream by penstocks, to irrigate his land: by means thereof, he injured defendant's land, through the consequent percolation of water under the soil, so as to overflow his kitchen and cellar. The defendant broke down one penstock and removed the upper boards of another, and his house became directly dry. In an action by plaintiff for destroying the penstock, the court held the action would not lie for that part of the injury to the penstocks necessary to abate the nuisance.

The principle which exempts a party from liability for digging upon and cultivating his own land as he pleases, though he may interfere with subterranean water, is designed for the benefit and protection of the landowner. As sought to be applied here, it would work his great injury. Landowners, under this rule, in the neighborhood of surface streams, could never know their rights or the value of their lands. They would be subject to the superior rights of mill-owners to damage the land for their benefit, without compensation.

The case, then, stands thus: The defendants are sued for drowning the plaintiff's land by an unauthorized interference with a surface stream, by pressing a part of that stream through its banks, by means of their artificial works, into the lands of the plaintiff, to his injury. The defendants answer, true, we did that for our benefit, but the law allows a party to interfere with underground, dead or percolating water, by sinking a well or digging drains on his own land. The reply is, you have interfered with a surface stream, not with underground, percolating water, and hence the doctrine of those cases affords you no protection. The point is, that the defendants, by their interference with a surface stream, have wrongfully pressed a part of it into percolated water, and thus drowned the plaintiff's land. When sued for this interference with a living, surface stream, they answer that they are not liable for interfering with water percolating under the earth. They insist upon defending

themselves against something for which they are not prosecuted. To hold that defendants would be liable, if their interference with the surface stream had damaged the plaintiff, by overflowing the natural banks and pressing it through the artificial embankment, but not if they pressed it through the natural banks, would be about as sound legal justice, to my mind, as if we should hold a man liable for stabbing another in the bosom, but, if he stabbed him under the arm, though the knife should come to the same point in the body, there should be no liability. Defendants also insist that they are not liable because it is not known how the injury occurred—that the principle is not understood. It is clear in this, as in the case of Cooper v. Barber, 3 Taunt. 99, and upon like proof, that this dam has, in fact, caused the injury, though we may fail to discover the principle on which it was done. The learned judge there called it a mere pretense to contend otherwise as to the fact. The defendant, then, is as much answerable for it as one would be who choked another to death, though it should be proved that science was utterly unable to declare how life should entirely leave the body by mere pressure upon the throat for a couple of minutes. These defendants tried an experiment for their own benefit, and found it seriously injured the plaintiff. When they see the injury they insist upon continuing it. They add that the plaintiff can protect himself, if he will appropriate a part of his land to a ditch, and will incur the expense of digging the ditch and keeping it in repair for their benefit. This shocks the sense of honesty and justice. To look after the mysteries that attend the circulation of subterranean water, not caused by interfering with a surface stream, is to seek darkness rather than light. There is no mystery as to the cause of this damage.

It is a familiar rule, that the pressure of water is in proportion to its height. The water was raised much higher than in its natural condition, and its natural banks, by this dam; and it is entirely clear that it was pressed into this land, either through the natural or artificial banks, or else between them. That was the position assumed at the circuit: when the water from the dam was drawn off, the water left this land. It is, therefore, not that the defendants have unreasonably, negligently, unintentionally, unnecessarily or unexpectedly flowed the plaintiff's land, to his injury, for their benefit, that they are liable. It is simply because they have done it in fact: they have done it by their works, and it cannot be charged to

extraordinary floods. In the language of the old books, "the defendants' *exaltavunt stagnum* by which the plaintiff's meadow was flooded," and they are liable therefor. (Godbolt, 58.) The necessity, motive, knowledge or care of defendants, forms no element of this action. Not the peculiar mode or manner of the injury, but the fact of the injury caused by the dam, in any mode or manner, is the ground of the action. Landowners have purchased their farms where a surface streams runs, in view of the conceded right to have that stream continue as it had been accustomed to run. If its current be interfered with, in any manner to the damage of their land, an action lies. An owner may dig upon or cultivate his land at his pleasure, though he cut off, or open, water circulating or dead under the earth, to his neighbor's injury. Such water is not different from the earth itself. He owns it. He does not own the water of a surface stream, and cannot set it back to another's injury, without liability.

The defendants also insist that the injury might be remedied by the plaintiff, at small cost, by digging a drain along the embankment. If this were true, he is not bound to do it. As the defendants caused the damage, without authority, and for their own benefit, they should find the remedy at their own expense. They might have purchased more land in which to make the ditch, if they have no ground now, or purchased the rights to flow the land of their neighbor. (Earle v. DeHart, 1 Beasl. 280; Wash. on Ease., 358.)

I have thus examined all the grounds on which the right to do this injury is based, and deem them all untenable. The defendants have violated the rights of the plaintiff, and flowed his land to his damage; law and justice alike require that they should pay that damage. It is urged by the defendants' counsel that, if mill-owners are held responsible for such damages, many of the mills may be ordered to be abated and destroyed. Not so; for probably no such right has ever before been claimed. But the answer to such an objection is precisely the same as would be given in case of injury by any other mode of flooding a person's land, for which they who cause it are confessedly liable. If they have flooded it for more than twenty years, they have the right to continue, on the legal presumption of a grant. Otherwise, if they will obstruct the natural flow of an open, running stream for their own profit, they must see to it that they do not thereby flood their neighbor's land to his in-

jury. For any light, trivial damage, by flowing over or through the bank, no court of equity, in the exercise of a conceded discretion on that subject, would interfere by injunction, or by order to abate. For a substantial injury, they would, as they should, grant relief. A court of equity will always see that substantial justice is done. It does not execute even legal rights, when to do so would be oppressive, but leaves the party to his remedy at law.

The judgment should be reversed and a new trial ordered, costs to abide the event.

DAVIES, Ch. J., read an opinion for affirmance, in which MORGAN, J., concurred.

Judgment reversed.

HAGUE v. WHEELER.

(157 Pa. St. 324.—1863.)

WILLIAMS, J. The learned judge of the court below was quite right in saying that the questions raised in this case "are of great importance and delicacy, and have never been determined in any court." The production of oil and gas in this State has furnished many questions "of great importance and delicacy" that were new, and required to be considered and determined upon facts that were never dreamed of by the sages of the common law. In the treatment of this case it is a matter of first importance to get a clear apprehension of the facts on which the questions are raised. There are two plaintiffs who join in the bill, whose interests, while like in kind, are nevertheless several and distinct. There are several defendants, but their interests appear to be joint. The two plaintiffs hold separate leases on parts of tracts in Warren and Foster counties, Nos. 5,202, 5,203, 5,207, and 5,209, aggregating about 2,200 acres. The gas company began drilling on its leases in 1887. Hague began in 1888. Each has a gas well or wells furnishing gas in sufficient volume to enable the owner to utilize it by transportation to and sale in towns in the vicinity. The defendants are owners and lessees of part of tract No. 5,207, which adjoins the lands of the gas company, and is not far from the lands of Hague. In 1890 they drilled a well on their tract, and obtained gas in considerable volume, but not sufficient to enable them to utilize it by transportation and sale.

They have therefore allowed it to escape into the open air. The plaintiffs allege that the "geological formation in that locality" is such that the gas-bearing sand rock underlying all these tracts and forming the common reservoir or deposit from which the gas is obtained "is subject to drainage by the drilling of wells on any part thereof." For this reason they assert that "the flow of gas from the said well of defendants is so great that it will, if allowed to go to waste, seriously and irreparably injure the wells of the plaintiffs by drainage from the lands adjoining and near to said defendants' wells. To prevent this they state that they entered on the defendants' land, and at a cost of about $200 shut in the gas and closed the well. The defendants then threatened to remove the cap or plug and permit the gas to escape again into the air. Upon these facts the plaintiffs asked the court below to enjoin the defendants from removing the cap or plug from the casing or tubing in the well, and from "permitting the gas therefrom to flow into the air, or otherwise go to waste." The injunction was granted, and from that decree this appeal was taken. The affidavits show that the defendants drilled their well in 1890, at the suggestion and request of the gas company, and that negotiations for its purchase by the gas company have been conducted at some length, but without resulting in a bargain. This fact—that the well in controversy had been drilled at considerable cost by the defendants, at the request of the gas company—the learned judge rightly regarded as a significant one. In the opinion filed by him, which is an able one, he says that this fact "might defeat this application so far as the gas company is concerned;" but he regarded it as of no consequence so far as the other plaintiff was concerned, for he immediately added: "But, as it cannot affect the plaintiff Hague, it is not necessary to consider it at this time." He then proceeds to state and consider the question on which his decree was based, upon a state of facts such as might arise where an adjoining owner was guilty of malice or negligence in the conduct of operations on his land resulting naturally in injury to his neighbor. But is this conclusion of the learned judge, that Hague stood on higher ground than the gas company, a correct one? The acts complained of were the drilling of the well in 1890, when the wells of both the plaintiffs were in full operation, and the subsequent failure to utilize or shut in the gas. The drilling of the well was accounted for, and the suggestion of malice or negligence therein negatived by proof that it was done at the instance of the

gas company. This company had a considerable gas plant, and was engaged in the supply of gas to its customers for fuel. It was interested in the development of the region, and evidently expected to buy the defendants' well if it was of sufficient size to be capable of utilization. The defendants and the gas company could not agree upon the price of the well after it was drilled, but the fact that it was drilled at the request of the company, and not of the mere motion of the defendants, was an answer to any allegation of malice or negligence on the part of Hague as well as on the part of the company, since it accounted for the act of drilling by assigning a motive therefor, both lawful and neighborly. It will not do to say that an act thus accounted for as to one plaintiff may be assumed to be the result of malice or negligence as to the other, in the absence of proof to sustain the assertion. These plaintiffs stand on common ground. Neither of them can complain of the defendants for the act of drilling the well on their land on any other ground than the existence of malice or negligence. When the act is accounted for in such a manner as to show that it was not done with malice, or in negligence, but in good faith, as an act of ownership, and at the solicitation of the gas company, the character of the act is established, and as a basis of relief it falls out of the case. What have we then? Three landowners owning considerable holdings in the same basin, or overlying the same gas-bearing sand rock, each having an open gas well or wells on his land, drilled without malice or negligence, in a lawful manner, and for a lawful purpose. Two of these owners have been able to utilize the gas from their respective lands and find a market for it. One of them has not been so fortunate. He has gas from his well, but up to the time of the filing of this bill he has not been able to utilize or dispose of it, and his gas has gone to waste for that reason. His more fortunate neighbors come into a court of equity, and ask that he shall not be permitted to let his gas run, because, while this gas is his own, underlying his tract, and finding its way to the surface through his well, it has a tendency to drain the sand rock, and so to reduce ultimately the flow of gas from their wells. This would be equally true if the defendants were able to utilize their gas; yet it is conceded that in that case their right to the gas from their well would be as incontestable as the right of the plaintiffs to use the gas from theirs. How is that right lost? By their inability to find a purchaser? If they can find a purchaser, or turn the gas to any useful purpose, their right to the

gas that flows from their well is conceded. If they cannot, their right is denied. Their well must be shut in, while their successful neighbors drain the entire basin through their open wells, and receive pay for the gas. This is a proposition to limit the power of the owner over his own by the use he is able to make of it. If he can sell his gas or his oil, or turn it to some practical purpose, his power over it as owner is unabridged. If he cannot find a purchaser, or a practical purpose to which to apply his yield of gas or oil, then his power as owner is gone. This would be an adaptation to actual business of the spiritual truth that "to him that hath shall be given; but from him that hath not shall be taken away even that which he seemeth to have."

Does the maxim, "*sic utere tuo ut alienum non lædas*," require us to grant the relief sought in this case? If in burning the gas from their well the defendants should direct the jet towards the plaintiffs' buildings or timber, or should leave it uncontrolled, so that the wind might drive it against or towards the plaintiffs' property so as to injure or endanger it, a case would be presented in which the maxim would be applicable, and we should take pleasure in enforcing it. If the defendants' well produced nothing, and they were leaving it without plugging, so that the water might find its way into the sand rock, to the injury of others, we could punish them under the statute which prescribes the manner of plugging an unproductive well, and makes it obligatory upon the owner to adopt it. But we have a well drilled for a lawful purpose, in a lawful manner, and actually producing gas, which is not directed towards the property of another, or so consumed as to affect the buildings, timber, or crops of any adjoining owner. It is therefore not the use of the gas of which the plaintiffs complain. It is the production of it when the owner cannot sell it or turn it to any practical purpose. Now, it is doubtless true that the public has a sufficient interest in the preservation of oil and gas from waste to justify legislation upon this subject. Something has been done in this direction already by the acts regulating the plugging of abandoned wells, but it is not the public interest that is involved in this litigation. It is the interest of an adjoining owner who seeks to appropriate to himself so much of his neighbor's gas as he cannot turn into money or use for some practical business purpose, and he asks a court of equity to hold his neighbor's hands by an injunction until this appropriation is accomplished. We cannot find any rule of law or any principle of equity

on which such an injunction can rest. The scope of the golden rule may be sufficiently ample to cover this case, and it may be that it would require an owner to surrender to his neighbor so much of his own property as he could not turn to his own advantage, if his neighbor was so situated that he could profit by it. Assuming this to be so, the moral obligation so arising is not enforceable by civil process. The owner of timber may pile it in heaps, and burn it, as was done in the early settlement of the country, notwithstanding the fact that his neighbor has a sawmill and all the facilities for preparing the sawed lumber for market and converting it into money. The power of the owner of the timber over it is neither greater nor less because of his neighbor's readiness and ability to market it. An owner of land may have a deposit of coal under some portion of it so small in extent, or with such an inclination, as to make it impossible for him to mine through his own tract without a greater cost to him than the value of the mined coal when brought to the surface. His neighbor may have an open mine that reaches it, and through which it could be brought at a fair profit. These circumstances do not affect the title of the owner of the coal, or confer any right on the adjoining mine owner; but it is said that the oil and gas are unlike the solid minerals, since they may move through the interstitial spaces or crevices in the sand rocks in search of an opening through which they may escape from the pressure to which they are subject. This is probably true. It is one of the contingencies to which this species of property is subject. But the owner of the surface is an owner downward to the center, until the underlying strata have been severed from the surface by sale. What is found within the boundaries of his tract belongs to him according to its nature. The air and the water he may use. The coal and iron or other solid mineral he may mine and carry away. The oil and gas he may bring to the surface and sell in like manner, to be carried away and consumed. His dominion is, upon general principles, as absolute over the fluid as the solid minerals. It is exercised in the same manner, and with the same results. He cannot estimate the quantity in place of gas or oil, as he might of the solid minerals. He cannot prevent its movement away from him, towards an outlet on some other person's land, which may be more or less rapid, depending on the dip of the rock or the coarseness of the sand composing it; but so long as he can reach it and bring it to the surface it is his absolutely, to sell, to use, to give away, or to

squander, as in the case of his other property. In the disposition he may make of it he is subject to two limitations: he must not disregard his obligations to the public, he must not disregard his neighbor's rights. If he uses his product in such a manner as to violate any rule of public policy or any positive provision of the written law, he brings himself within the reach of the courts. If the use he makes of his own, or its waste, is injurious to the property or the health of others, such use or waste may be restrained, or damages recovered therefor; but, subject to these limitations, his power as an owner is absolute, until the Legislature shall, in the interest of the public as consumers, restrict and regulate it by statute.

The decree of the court below is reversed, and the injunction is dissolved.

FORBELL v. CITY OF NEW YORK.

(164 N. Y. 522; 58 N. E. 644.—1900.)

The judgment appealed from, granted a perpetual injunction restraining the city of New York from operating its engines, driven wells, and pumping stations known as the "Spring Creek Pumping Station," in the borough of Queens, city of New York, on the conduit line near the Kings County boundary line, and awards past damages to the plaintiff in the sum of $6,000, together with the costs of the action. The plaintiff was a lessee of certain farming lands situated near Spring creek, within the county of Kings. He used a portion of the lands in question for the purpose of growing celery and water cresses. The city of Brooklyn constructed a pumping station in the place in question early in 1885, and in 1894 sunk additional wells and made an additional pumping station. The effect of pumping at these stations was to lower the underground water table on this land, and thus made it unfit for the cultivation of celery or water cresses, and the crops failed for many years prior to the commencement of this action, in 1898.

LANDON, J. The defendant makes merchandise of the large quantities of water which it draws from the wells that it has sunk upon its two acres of land. The plaintiff does not complain that any surface stream or pond or body of water upon his own land

is thereby affected, but does complain, and the courts below have found, that the defendant exhausts his land of its accustomed and natural supply of underground or subsurface water, and thus prevents him from growing upon it the crops to which the land was and is peculiarly adapted, or destroys such crops after they are grown or partly grown. The defendant does not take from its own land simply its natural or accustomed supply or holding, but by means of its appliances and operations it takes and appropriates a large part of the natural and accustomed supply or holding of the plaintiff's land. The case is not one where, because the percolation and course of the subsurface waters are unobservable from the surface, they are unknown, and thus so far speculative and conjectural as to be incapable of proof or judicial ascertainment. Before the defendant constructed its wells and pumping stations it ascertained, at least to a business certainty, that such was the percolation and underground flow or situation of the water in its own and the plaintiff's land that it could by these wells and appliances cause or compel the water in the plaintiff's land to flow into its own wells, and thus could deprive the plaintiff of his natural supply of underground water. This it has accomplished just as it expected to do it; the evidence to that effect is about as satisfactory and convincing as if the case were one of surface waters. That the defendant has so used its own as to injure the plaintiff there is no question. The question is whether the plaintiff has or ought to have, in the just administration of the law, a remedy. In Smith v. City of Brooklyn, 160 N. Y. 357, 54 N. E. 787, 45 L. R. A. 664, a case in which the defendant, by the use of the same act and appliances as it employed in this case, lowered the water in the plaintiff's surface stream and pond, this court, in holding the defendant liable for the damage thus caused, carefully refrained from considering the question whether the defendant would have been liable if it had simply lowered the subsurface level or body of underground water not contributing to the supply of plaintiff's surface stream or pond. It may be conceded that the letter of the law, as expounded in many cases in this State, denies liability. Ellis v. Duncan, 21 Barb. 230; Goodale v. Tuttle, 29 N. Y. 459; Pixley v. Clark, 35 N. Y. 520; Village of Delhi v. Youmans, 45 N. Y. 362; Phelps v. Nowlen, 72 N. Y. 40; Bloodgood v. Ayers, 108 N. Y. 400, 15 N. E. 433; Van Wycklen v. City of Brooklyn, 118 N. Y. 424, 24 N. E. 179. The earlier cases followed the law as stated in Acton v. Blundell, 12 Mees. & W. 324, and

Greenleaf v. Francis, 18 Pick. 117. So far as the extraction or diversion of underground water upon the land of one proprietor affects no surface stream or pond upon the neighboring land, but simply the underground water therein, the rule is still adhered to.

The reasons usually assigned for the rule are that the owner of the soil may lawfully occupy the space above as well as below the surface to any extent that he pleases; that the water stored or held in his soil, so long as it remains there, is—unlike water flowing in a surface stream—a part of the soil itself (Barkley v. Wilcox, 86 N. Y. 140); that a different rule would prevent the reasonable use and improvement of land; that without a grant or positive statute there can be no easement in one parcel of land for the subsurface support or supply of subsurface water in another parcel; that the percolation and underground flow of water are out of sight, and their exact operation and courses are conjectural, and not susceptible of actual observation and proof; and, finally, that the damages, if any, are the remote or indirect consequence of lawful acts.

It may be conceded that these reasons, or some of them, were ample to afford the proper rule of decision in the cases to which they were applied. We do not intend to impair their applicability to like cases. But there are features of this case to which these reasons do not apply. As already intimated, the defendant installed its pumping plant knowing that the underground operation and habit of this store of water in its own and neighboring lands, including the plaintiff's, a total area of from five to eleven square miles, would enable it to capture the greater part of it. In the cases in which the lawfulness of interference with percolating waters has been upheld, either the reasonableness of the acts resulting in the interference, or the unreasonableness of imposing an unnecessary restriction upon the owner's dominion of his own land, has been recognized. In the absence of contract or enactment, whatever it is reasonable for the owner to do with his subsurface water, regard being had to the definite rights of others, he may do. He may make the most of it that he reasonably can. It is not unreasonable, so far as it is now apparent to us, that he should dig wells and take therefrom all the water that he needs in order to the fullest enjoyment and usefulness of his land as land, either for purposes of pleasure, abode, productiveness of soil, trade, manufacture, or for whatever else the land as land may serve. He may consume it,

but must not discharge it to the injury of others. But to fit it up with wells and pumps of such pervasive and potential reach that from their base the defendant can tap the water stored in the plaintiff's land, and in all the region thereabout, and lead it to his own land, and by merchandising it prevent its return, is, however reasonable it may appear to the defendant and its customers, unreasonable as to the plaintiff and the others whose lands are thus clandestinely sapped, and their value impaired.

The learned trial judge found that the acts of the defendant were a trespass. No doubt trespass may be committed by the projection of force beyond the boundary of the lot where the projecting instrument is operated. Injuries caused by explosions are familiar instances. We think the finding justified by the particular facts of this case. Force is not necessarily direct violence. It may be produced by the employment of such material agencies or instruments as become effective by the co-operation of the forces of nature, and such is the case before us.

The distinction between a case like this and the cases of percolating waters, in which liability has been denied, was well pointed out by the learned judge who wrote for the appellate division in Smith v. City of Brooklyn, 18 App. Div. 340, 46 N. Y. Supp. 141. We refer to the opinion as a valuable contribution to the discussion of the subject.

We more readily conclude to affirm because the immunity from liability which the defendant claims violates our sense of justice. It seems to pervert just rules to unjust purposes. It does wrong under the letter of the law, in defiance of its spirit. The case is certainly unlike those which have preceded it in this court, and we may consider the rules announced in the previous cases in the light of the cases themselves. We recognize the fact that the water supply of a great city is of vastly more importance than the celery and water cresses of which the plaintiff's land was so productive before the defendant encroached upon his water supply. But the defendant can employ the right of eminent domain, and thus provide its people with water without injustice to the plaintiff.

The judgment should be affirmed, with costs.

JONES v. FOREST OIL CO.

(194 Pa. 879; 44 At. 1074.—1900.)

FRAZIER, J. "The question for determination in this case is a new one. Counsel have not referred us to any case in which this question was involved; nor have we, in our examination of the case, found any. The question here is to what extent an owner of oil wells may use mechanical devices for bringing the oil to the surface. In operating his own wells, may he use appliances which diminish the production of his neighbor's wells? It is not denied that a gas pump will to some extent affect the production of oil wells located in the immediate neighborhood of the well to which the pump is attached, if the sand from which the oil is obtained is of a porous, pebbly nature, as is the case in the McCurdy field.

"To some extent, the law governing the use of subterranean waters by the owner of the surface is applicable to the production of oil. In regard to wells and springs, the law is well settled that the owner of land is not entitled to recover for injuries to his wells and springs caused by the acts of an adjoining owner, if the injury results from a lawful exercise of the rights of the adjoining owner, on his own property, and without malice or negligence. An owner of land may dig a well upon his property, and if, in so doing, he taps the hidden flow of water which supplies his neighbor's spring, it is a loss to the neighbor for which the law provides no remedy. Lybe's Appeal, 106 Pa. St. 626. In Coal Co. v. Sanderson, 113 Pa. St. 145, 6 Atl. 456, it is said: 'It must be conceded, we think, that every man is entitled to the ordinary and natural use and enjoyment of his property. He may cut down the forest trees, clear and cultivate his land, although in so doing he may dry up the sources of his neighbor's springs, or remove the natural barriers against wind and storm. In sinking his well he may intercept and appropriate the water which supplies his neighbor's well.' In this case the defendant has the exclusive right to bore for oil on the farm of the Boyce heirs adjoining a farm owned by plaintiff. The right being a lawful one, the defendant is at liberty to use all lawful means to obtain all the gas and oil contained in, or obtainable through, the land. Gas Co. v. De Witt, 130 Pa. St. 249, 18 Atl. 725, 5 L.

R. A. 732. And to that end it may resort to the use of all known lawful modern machinery and appliances.

"The plaintiff's claim is that the use of a gas pump in the production of oil is unlawful because, as he alleges, by its powerful suction the oil and gas are drawn from his adjoining farm, thereby decreasing his production. Plaintiff assumes that there is a certain fixed amount of oil and gas under his farm, in which he has an absolute property. True, they belong to him while they are part of his land; but when they migrate to the lands of his neighbor, or become under his control, they belong to the neighbor. On this point, in Brown v. Vandergrift, 80 Pa. St. 147, Judge AGNEW, in referring to the production of petroleum, says: 'Its fugitive and wandering existence within the limits of a particular tract is uncertain.' And in Gas Co. v. De Witt, *supra*, Justice MITCHELL says: 'Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *feræ naturæ*. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. They belong to the owner of the land, and are a part of it, so long as they are on or in it, and are subject to his control; but when they escape and go into other land, or come under others' control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining or even a distant owner drills his own land and taps your gas, so that it comes into his well and under his control, it is no longer yours, but his.'

"From these cases we conclude that the property of the owner of lands in oil and gas is not absolute until it is actually within his grasp, and brought to the surface. If possession of the land is not necessarily possession of the oil and gas, is there any reason why an oil and gas operator should not be permitted to adopt any and all appliances known to the trade to make the production of his wells as large as possible? If one may lawfully use a steam pump, may he not lawfully use a gas pump? In Ballard v. Tomlinson, 29 Ch. Div. 115, it was held that a landowner has the right to all of the percolating stream under his land, the court saying: 'This percolating water below the surface of the earth is therefore a common reservoir or course, to which nobody has any property, but of which everybody has the right, so far as he can, of appropriating the whole. The principle of natural use does not apply at all. The plaintiff, if

he has a right to use anything in nature, has a right to exercise that user by all the skill and invention of which a man is capable; and it seems to me that as long as the plaintiff uses only lawful means as against his neighbor, however injurious or however artificial those means may be, his right to appropriate the common source is not diminished because he uses the most artificial or most injurious methods.' If it is lawful to take water from substrata by the 'exercise of all the skill and invention of which man is capable,' we see no reason why it is not lawful to produce oil by those means, especially as the possession of the soil for purposes of tillage gives the owner no actual possession of the oil and gas underlying it. The evidence shows that the gas pump has been in constant use in all fields, except one, to a greater or less extent, since the discovery of oil; that its use has been generally recognized by all operators; and that it is only used on wells in territory which is almost exhausted. Gas pumps have been used in this field for almost a year past, within 1,500 feet of the wells of both plaintiff and defendant, without objection. Their cost is within the reach of all operators, and, when used by all, none are injured.

"It seems to me that if it is unlawful to use a gas pump, because its use may perhaps lessen the supply of gas in the well of an adjoining owner, and thereby diminish his production of oil, for the same reason it is unlawful to use a steam pump; and, if neither gas nor steam can lawfully be used in pumping, very few wells at this day will pay drilling and operating expenses.

"In view of the testimony and authorities above cited, we conclude that the use of a gas pump by defendant, under the circumstances of this case, is not an unlawful act that should be restrained by injunction; that the plaintiff is not entitled to the relief prayed for; and that the bill should be dismissed. And now, July ——, 1899, the preliminary injunction heretofore granted in this case is dissolved, and the bill dismissed, at costs of plaintiff."

PER CURIAM. Though this particular question is somewhat of a novelty, the principles which control it are very familiar, and perfectly well settled. They are well expressed in the opinion of the learned court below, and, on the findings of fact and conclusions of law there contained, we affirm the decree.

OHIO OIL CO. v. INDIANA.

(177 U. S. 190; 20 Sup. Ct. R. 576.—1900.)

WHITE, J. The assignments of error all in substance are resolvable into one proposition, which is, that the enforcement of the provisions of the Indiana statute as against the plaintiff in error constituted a taking of private property without adequate compensation, and therefore amounted to a denial of due process of law in violation of the Fourteenth Amendment.

When this proposition is analyzed by the light of the facts which are admitted on the record, it becomes apparent that the foundation upon which it must rest involves two contentions which are in conflict one with the other; in other words, the argument by which alone it is possible to sustain the claim becomes when truly comprehended, self-destructive. Thus, it is apparent, from the admitted facts, that the oil and gas are commingled and contained in a natural reservoir which lies beneath an extensive area of country, and that as thus situated the gas and oil are capable of flowing from place to place, and are hence susceptible of being drawn off by wells from any point, provided they penetrate into the reservoir. It is also undoubted that such wells, when bored from many points in the superincumbent surface of the earth, are apt to reach the reservoir beneath. From this it must necessarily come to pass that the entire volume of gas and oil is in some measure liable to be decreased by the act of anyone who, within the superficial area, bores wells from the surface and strikes the reservoir containing the oil and gas. And hence, of course, it is certain, if there can be no authority exerted by law to prevent the waste of the entire supply of gas and oil, or either, that the power which exists in everyone who has the right to bore from the surface and tap the reservoir involves in its ultimate conception, the unrestrained license to waste the entire contents of the reservoir by allowing the gas to be drawn off and to be dispersed in the atmospheric air, and by permitting the oil to flow without use or benefit to anyone. These things being lawful, as they must be if the acts stated cannot be controlled by law, it follows that no particular individual having a right to make borings can complain, and thus the entire product of oil and gas can be destroyed by any one of the surface owners. The proposition, then, which denies the

power in the state to regulate by law the manner in which the gas and oil may be appropriated, and thus prevent their destruction, of necessity involves the assertion that there can be no right of ownership in and to the oil and gas before the same have been actually appropriated by being brought into the possession of some particular person. But it cannot be that property as to a specified thing vests in one who has no right to prevent any other person from taking or destroying the object which is asserted to be the subject of the right of property. The whole contention, therefore, comes to this: That property has been taken without due process of law, in violation of the Fourteenth Amendment, because of the fact that the thing taken was not property, and could not, therefore, be brought within the guaranties ordained for the protection of property.

The confusion of thought which permeates the entire argument is two fold: First, an entire misconception of the nature of the right of the surface owner to the gas and oil as they are contained in their natural reservoir, and this gives rise to a misconception as to the scope of the legislative authority to regulate the appropriation and use thereof. Second, a confounding, by treating as identical, things which are essentially separate; that is, the right of the owner of land to bore into the bosom of the earth, and thereby seek to reduce the gas and oil to possession, and his ownership after the result of the borings has reached fruition to the extent of oil and gas by himself actually extracted and appropriated. In other words, the fallacy arises from considering that the means which the owner of land has a right to use to obtain a result is in legal effect the same as the result which may be reached. We will develop the misunderstanding which is involved in the matters just stated.

No time need be spent in restating the general common-law rule that the ownership in fee of the surface of the earth carries with it the right to the minerals beneath, and the consequent privilege of mining to extract them. And we need not, therefore, pause to consider the scope of the legislative authority to regulate the exercise of mining rights and to direct the methods of their enjoyment so as to prevent the infringement by one miner of the rights of others. Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co., 171 U. S. 60, 43 L. ed. 74, 18 Sup. Ct. Rep. 895. The question here arising does not require a consideration of the matters just referred to, but it is this: Does the peculiar character of the substances, oil and gas, which are here involved, the manner in which they are held

in their natural reservoirs, the method by which and the time when they may be reduced to actual possession or become the property of a particular person, cause them to be exceptions to the general principles applicable to other mineral deposits, and hence subject them to different rules? True it is that oil and gas, like other minerals, are situated beneath the surface of the earth, but except for this one point of similarity, in many other respects they greatly differ. They have no fixed situs under a particular portion of the earth's surface within the area where they obtain. They have the power, as it were, of self-transmission. No one owner of the surface of the earth, within the area beneath which the gas and oil move, can exercise his right to extract from the common reservoir, in which the supply is held, without, to an extent, diminishing the source of supply as to which all other owners of the surface must exercise their rights. The waste by one owner, caused by a reckless enjoyment of his right of striking the reservoir, at once, therefore, operates upon the other surface owners. Besides, whilst oil and gas are different in character, they are yet one, because they are unitedly held in the place of deposit. In Brown v. Spilman, 155 U. S. 665, 669, 670, 39 L. ed. 304, 305, 15 Sup. Ct. Rep. 245, 247, these distinctive features of deposits of gas and oil were remarked upon. The court said:

"Petroleum gas and oil are substances of a peculiar character, and decisions in ordinary cases of mining for coal, and other minerals which have a fixed situs, cannot be applied to contracts concerning them without some qualifications. They belong to the owner of the land, and are a part of it, so long as they are on it or in it, or subject to his control, but when they escape and go into other land, or come under another's control, the title of the former owner is gone. If an adjoining owner drills his own land and taps a deposit of oil or gas, extending under his neighbor's field, so that it comes into his well, it becomes his property. Brown v. Vandergrift, 80 Pa. 142, 147; Westmoreland & C. Natural Gas Co.'s Appeal, 25 W. N. C. 103.

(After quoting from several Pennsylvania and Indiana decisions, the learned judge continued:)

Without pausing to weigh the reasoning of the opinions of the Indiana court in order to ascertain whether they in every respect harmonize, it is apparent that the cases in question, in accord with the rule of general law, settle the rule of property in the State of

Indiana to be as follows: Although in virtue of his proprietorship the owner of the surface may bore wells for the purpose of extracting natural gas and oil until these substances are actually reduced by him to possession he has no title to them as owner. That is, he has the exclusive right on his own land to seek to acquire them, but they do not become his property until the effort has resulted in dominion and control by actual possession. It is also clear from the Indiana cases cited that, in the absence of regulation by law, every owner of the surface within a gas field may prosecute his efforts and may reduce to possession all or every part, if possible, of the deposits, without violating the rights of the other surface owners.

If the analogy between animals *ferae naturae* and mineral deposits of oil and gas, stated by the Pennsylvania court and adopted by the Indiana court, instead of simply establishing a similarity of relation, proved the identity of the two things, there would be an end of the case. This follows because things which are *ferae naturae* belong to the "negative community;" in other words, are public things subject to the absolute control of the state, which, although it allows them to be reduced to possession, may at its will not only regulate, but wholly forbid, their future taking. Geer v. Connecticut, 161 U. S. 519, 525, 40 L. ed. 793, 795, 16 Sup. Ct. Rep. 600. But whilst there is an analogy between animals *ferae naturae* and the moving deposits of oil and natural gas, there is not identity between them. Thus, the owner of land has the exclusive right on his property to reduce the game there found to possession, just as the owner of the soil has the exclusive right to reduce to possession the deposits of natural gas and oil found beneath the surface of his land. The owner of the soil cannot follow game when it passes from his property; so, also, the owner may not follow the natural gas when it shifts from beneath his own to the property of someone else within the gas field. It being true as to both animals *ferae naturae* and gas and oil, therefore, that whilst the right to appropriate and become the owner exists, proprietorship does not take being until the particular subjects of the right become property by being reduced to actual possession.

The identity, however, is for many reasons wanting. In things *ferae naturae* all are endowed with the power of seeking to reduce a portion of the public property to the domain of private ownership by reducing them to possession. In the case of natural gas and oil no such right exists in the public. It is vested only in the owners

in fee of the surface of the earth within the area of the gas field. This difference points at once to the distinction between the power which the lawmaker may exercise as to the two. In the one, as the public are the owners, every one may be absolutely prevented from seeking to reduce to possession. No devesting of private property under such a condition can be conceived, because the public are the owners, and the enacting by the State of a law as to the public ownership is but the discharge of the governmental trust resting in the state as to property of that character. Geer v. Connecticut, 161 U. S. 519, 525, 40 L. ed. 793, 795, 16 Sup. Ct. Rep. 600. On the other hand, as to gas and oil the surface proprietors within the gas field all have the right to reduce to possession the gas and oil beneath. They could not be absolutely deprived of this right which belongs to them without a taking of private property. But there is a coequal right in them all to take from a common source of supply the two substances which in the nature of things are united, though separate. It follows from the essence of their right and from the situation of the things as to which it can be exerted, that the use by one of his power to seek to convert a part of the common fund to actual possession may result in an undue proportion being attributed to one of the possessors of the right to the detriment of the others, or by waste by one or more to the annihilation of the rights of the remainder. Hence it is that the legislative power, from the peculiar nature of the right and the objects upon which it is to be exerted, can be manifested for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment, by them, of their privilege to reduce to possession, and to reach the like end by preventing waste. This necessarily implied legislative authority is borne out by the analogy suggested by things *ferae naturae,* which it is unquestioned the legislature has the authority to forbid all from taking, in order to protect them from undue destruction, so that the right of the common owners, the public, to reduce to possession, may be ultimately efficaciously enjoyed.

Viewed, then, as a statute to protect or to prevent the waste of the common property of the surface owners, the law of the State of Indiana which is here attacked because it is asserted that it devested private property without due compensation, in substance, is a statute protecting private property and preventing it from being taken by one of the common owners without regard to the enjoyment of the others. Indeed, the entire argument upon which the attack on

the statute must depend involves a dilemma, which is this: If the right of the collective owners of the surface to take from the common fund, and thus reduce a portion of it to possession, does not create a property interest in the common fund, then the statute does not provide for the taking of private property without compensation. If, on the other hand, there be, as a consequence of the right of the surface owners to reduce to possession, a right of property in them in and to the substances contained in the common reservoir of supply, then, as a necessary result of the right of property, its indivisible quality, and the peculiar position of the things to which it relates, there must arise the legislative power to protect the right of property from destruction. To illustrate by another form of statement the argument is this: There is property in the surface owners in the gas and oil held in the natural reservoir. Their right to take cannot be regulated without devesting them of their property without adequate compensation, in violation of the Fourteenth Amendment, and this although it be that if regulation cannot be exerted one property owner may deprive all the others of their rights, since his act in so doing will be *damnum absque injuria.* This is but to say that one common owner may devest all the others of their rights without wrongdoing, but the lawmaking power cannot protect all the owners in their enjoyment without violating the Constitution of the United States.

These considerations are sufficient to dispose of the case. But as there are several contentions which seem to have been considered, in argument, as resting on different premises, though such in reason is not the case, we briefly notice them separately: First. It is argued that as the gas, before being allowed to disperse in the air, serves the purpose of forcing up the oil, therefore it is not wasted, hence is not subject to regulation. Second. That the answer averred that the defendant was so situated as not to be able to use or dispose of the gas which comes to the surface with the oil; from which it follows that the gas must either be stored or dispersed in the air. Now, the answer further asserted that when the gas is stored and not used, the back pressure, on the best known pump, would, if not arresting its movement, at least greatly diminish its capacity. Hence it is said the law by making it unlawful to allow the gas to escape made it practically impossible to profitably extract the oil. That is, as the oil could not be taken at a profit by one who made no use of the gas, therefore he must be allowed to waste the gas into

the atmosphere, and thus destroy the interest of the other common owners in the reservoir of gas. These contentions but state in a different form the matters already disposed of. They really go, not to the power to make the regulations, but to their wisdom. But with the lawful discretion of the legislature of the State we may not interfere.

In view of the fact that regulations of natural deposits of oil and gas and the right of the owner to take them as an incident of title in fee to the surface of the earth, as said by the supreme court of Indiana, is ultimately but a regulation of real property, and they must hence be treated as relating to the preservation and protection of rights of an essentially local character. Considering this fact and the peculiar situation of the substances, as well as the character of the rights of the surface owners, we cannot say that the statute amounts to a taking of private property, when it is but a regulation by the State of Indiana of a subject which especially comes within its lawful authority.

Affirmed.

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§ 7.—CONFLICTING RIGHTS. (B.)—RIVAL BUSINESS.

THE SOUTH ROYALTON BANK v. THE SUFFOLK BANK.

(27 Vt. 505.—1854.)

BENNETT, J. This case comes up upon a general demurrer to the plaintiff's declaration, and, of course, the only question is whether a legal cause of action is set out in the declaration. It may with truth be said, that an attempt to maintain an action upon the facts stated in the declaration is novel; but this does not prove conclusively that the action cannot be sustained in this age of progress. The facts stated in the declaration are briefly that the plaintiffs, being a banking corporation, had put in circulation a large amount of their bills, and that the bills would have had a continued and extended circulation, had it not been for the acts of the defendants, to the great gain and profit of the plaintiffs; and that the Suffolk Bank bought them up from time to time, and have refused to exchange them for other money and kept them out of circulation, and have called upon and compelled the plaintiffs to redeem the bills in specie.

The declaration charges that the acts of the defendants were performed with wicked and corrupt motives, and with an intent to injure, oppress and embarrass the plaintiffs in their business, whereby they have been damaged in their business; harassed, oppressed and deprived of great gains, as they say, which they otherwise would have made, to wit, ten thousand dollars. It is hardly necessary to say that the plaintiffs issued their bills as a circulating medium in lieu of specie currency, and that it was the right of the defendants, in common with others, to purchase in their bills, and thus withdraw them from circulation, until they should choose again to put them in circulation or call upon the plaintiffs to redeem their promise by the payment of their bills in specie.

The defendants are not charged with doing any act in itself considered wrong, but it is attempted to make the acts actionable by reason of the bad motive imputed to the defendants in doing them. This case seems to us but an ordinary one of a creditor calling upon his debtor for his pay, at a time, and at a place, and in a manner to which the debtor has no right to make objection. It was morally and legally the duty of the plaintiffs at all times to be ready and willing to redeem their bills, and if it has operated to their injury to be called upon at any particular time to redeem a particular amount, it is "*damnum absque injuria.*" Here was no unlawful conspiracy by the defendants with others, either to do a lawful act in an unlawful manner, or an unlawful act to the injury of the plaintiffs; but the declaration charges, in effect, that the acts were done from bad motives in the defendants. This, we think, is not enough. Motive alone is not enough to render the defendants liable for doing those acts which they had a right to do. It is too well settled to need authority that malice alone will not sustain an action for a vexatious suit. There must also be want of probable cause. This principle is enough to settle this case. If the defendants could not be sued for instituting suits, maliciously to collect pay upon the plaintiffs' bills which they lawfully held, much less could they be sued for simply calling upon the defendants for pay, without the intervention of a suit, though done with malice. It may be true that sometimes the consequences attending an act may serve to give character to that act, and the rule has become established and grown into a maxim that a man must use his own rights with due regard to the rights of others; but this principle does not apply to the present case. Here the act of presenting the plaintiffs' bills for payment

has no natural connection with any injurious consequences to follow from it, and if such consequences follow they must be fortuitous, and cannot give character to the act so as to render it unlawful. See Williams v. Hunter, 3 Hawks, 545; also 31 Maine, 438.

It seems impossible to distinguish the case made in the plaintiffs' declaration from an action for maliciously holding a party to bail, or suing out a writ when nothing is due, in which case the gist of the action is malice and the want of a probable cause, and the principle of that class of cases must govern this.

The result is, the judgment of the County Court is affirmed.

MOGUL STEAMSHIP CO. v. McGREGOR, GOW & CO.

(1892.—Appeal Cases 25.)

The defendants are firms and companies owning steam vessels which ply regularly, during the whole year, some of them on the Great River of China between Hankow and Shanghai, and others between Shanghai and European ports. The plaintiffs are a ship-owning company, not maintaining a regular service either on the Great River between Europe and Hankow, but sending vessels to Hankow during the tea season, with the legitimate object of sharing in the profits of the tea-carrying trade. The defendants entered into an agreement, the avowed purpose of which was to secure for themselves as much of the tea shipped from Hankow as their vessels could conveniently carry, which was practically the whole of it, and to prevent the plaintiffs and other outsiders from obtaining a share of the trade. The means used were: Firstly, a rebate to those who dealt exclusively with them; secondly, the sending of ships to compete with the plaintiffs' ships; thirdly, the lowering of freights; fourthly, the indemnifying other vessels that would compete with the plaintiffs'; fifthly, the dismissal of agents who were acting for them and the plaintiffs.

Lord HALSBURY, L. C. An associated body of traders endeavor to get the whole of a limited trade into their own hands by offering exceptional and very favorable terms to customers who will deal exclusively with them; so favorable that but for the object of

keeping the trade to themselves they would not give such terms; and if their trading were confined to one particular period they would be trading at a loss, but in the belief that by such competition they will prevent rival traders competing with them, and so receive the whole profits of the trade themselves. I do not think that I have omitted a single fact upon which the appellants rely to show that this course of dealing is unlawful and constitutes an indictable conspiracy.

Now it is not denied and cannot be even argued that *prima facie* a trader in a free country in all matters "not contrary to law may regulate his own mode of carrying on his trade according to his own discretion and choice." This is the language of Baron Alderson in delivering the judgment of the Exchequer Chamber, Hilton v. Eckersley, 6 E. & B. at pp. 74, 75, and no authority, indeed no argument, has been directed to qualify that leading proposition. It is necessary, therefore, for the appellants here to show that what I have described as the course pursued by the associated traders is a "matter contrary to law." Now, after a most careful study of the evidence in this case, I have been unable to discover anything done by the members of the associated body of traders other than an offer of reduced freights to persons who would deal exclusively with them; and if this is unlawful it seems to me that the greater part of commercial dealings, where there is rivalry in trade, must be equally unlawful.

There are doubtless to be found phrases in the evidence which, taken by themselves, might be supposed to mean that the associated traders were actuated by a desire to inflict malicious injury upon their rivals; but when one analyzes what is the real meaning of such phrases it is manifest that all that is intended to be implied by them is that any rival trading which shall be started against the association will be rendered unprofitable by the more favorable terms,—that is to say, the reduced freights, discounts, and the like which will be given to customers who will exclusively trade with the associated body. And, upon a review of the facts, it is impossible to suggest any malicious intention to injure rival traders, except in the sense that in proportion as one withdraws trade that other people might get, you, to that extent, injure a person's trade when you appropriate the trade yourself. If such an injury, and the motive of its infliction, is examined and tested upon principle, and can be truly asserted to be a malicious motive within the meaning

of the law that prohibits malicious injury to other people, all competition must be malicious and consequently unlawful, a sufficient *reductio ad absurdum* to dispose of that head of suggested unlawfulness.

The learned counsel who argued the case for the appellants with their usual force and ability, were pressed from time to time by some of your Lordships to point out what act of unlawful obstruction, violence, molestation, or interference was proved against the associated body of traders, and as I have said, the only wrongful thing upon which the learned counsel could place their fingers was the competition which I have already dealt with. Intimidation, violence, molestation, or the procuring of people to break their contracts, are all of them unlawful acts; and I entertain no doubt that a combination to procure people to do such acts is a conspiracy and unlawful. The sending up of ships to Hankow, which in itself, and to the knowledge of the associated traders, would be unprofitable, but was done for the purpose of influencing other traders against coming there and so encouraging a ruinous competition, is the one fact which appears to be pointed to as out of the ordinary course of trade. My Lords, after all, what can be meant by "out of the ordinary course of trade?" I should rather think, as a fact, that it is very commonly within the ordinary course of trade so to compete for a time as to render trade unprofitable to your rival in order that when you have got rid of him you may appropriate the profits of the entire trade to yourself. I entirely adopt and make my own what was said by Lord Justice BOWEN in the court below:—"All commercial men with capital are acquainted with the ordinary expedient of sowing one year a crop of apparently unfruitful prices, in order by driving competition away to reap a fuller harvest of profit in the future; and until the present argument at the Bar it may be doubted whether shipowners or merchants were ever deemed to be bound by law to conform to some imaginary 'normal' standard of freights or prices, or that law courts had a right to say to them in respect to their competitive tariffs, 'Thus far shalt thou go, and no further.'"

Excluding all I have excluded upon my view of the facts, it is very difficult indeed to formulate the proposition. What is the wrong done? What legal right is interfered with? What coercion of the mind, or will, or of the person is effected? All are free to trade upon what terms they will, and nothing has been done except

in rival trading which can be supposed to interfere with the appellants' interests.

I think this question is the first to be determined: What injury, if any, has been done? What legal right has been interfered with? Because if no legal right has been interfered with, and no legal injury inflicted, it is vain to say that the thing might have been done by an individual, but cannot be done by a combination of persons. My Lords, I do not deny that there are many things which might be perfectly lawfully done by an individual, which, when done by a number of persons, become unlawful. I am unable to concur with the Lord Chief Justice's criticism, 21 Q. B. D. 551 (if its meaning was rightly interpreted, which I very much doubt) on the observations made by my noble and learned friend Lord BRAMWELL in Reg. v. Druitt, 10 Cox, C. C. 592, if that was intended to treat as doubtful the proposition that a combination to insult and annoy a person would be an indictable conspiracy. I should have thought it as beyond doubt or question that such a combination would be an indictable misdemeanor, and I cannot think the Chief Justice meant to throw any doubt upon such a proposition. But in this case the thing done, the trading by a number of persons together, effects no more and is no more, so to speak, a combined operation than that of a single person. If the thing done is rendered unlawful by combination, the course of trade by a person who singly trades for his own benefit and apart from partnership or sharing profits with others, but nevertheless avails himself of combined action, would be open to the same objections.

The merchant who buys for him, the agent who procures orders for him, the captain who sails his ship, and even the sailors (if they might be supposed to have knowledge of the transaction) would be acting in combination for the general result, and would, whether for the benefit of the individual, or for an associated body of traders, make it not the less combined action than if the combination were to share profits with the independent traders; and if a combination to effect that object would be unlawful, the sharers in the combined action could, in a charge of criminal conspiracy, make no defense that they were captain, agent, or sailors, respectively, if they were knowingly rendering their aid to what, by the hypothesis, would be unlawful if done in combination.

A totally separate head of unlawfulness has, however, been introduced by the suggestion that the thing is unlawful because in re-

straint of trade. There are two senses in which the word "unlawful" is not uncommonly though, I think, somewhat inaccurately used. There are some contracts to which law will not give effect; and therefore, although the parties may enter into what, but for the element which the law condemns, would be perfect contracts, the law would not allow them to operate as contracts, notwithstanding that, in point of form, the parties have agreed. Some such contracts may be void on the ground of immorality; some on the ground that they are contrary to public policy; as, for example, in restraint of trade; and contracts so tainted, the law will not lend its aid to enforce. It treats them as if they had not been made at all. But the more accurate use of the word "unlawful," which would bring the contract within the qualification which I have quoted from the judgment of the Exchequer Chamber, namely, as contrary to law, is not applicable to such contracts. It has never been held that a contract in restraint of trade is contrary to law in the sense I have indicated. A judge in very early times expressed great indignation at such a contract; and Mr. Justice CROMPTON undoubtedly did say (in a case where such an observation was wholly unnecessary to the decision and therefore manifestly obiter) the parties to a contract in restraint of trade would be indictable. I am unable to assent to that dictum. It is opposed to the whole current of authority; it was dissented from by Lord CAMPBELL and Chief Justice ERLE, and found no support when the case in which it was said came to the Exchequer Chamber, and it seems to me contrary to principle.

In the result, I think that no case was made out of a conspiracy such as the appellants here undertook to establish; and it is not unimportant for the reasons I have given to see what is the conspiracy alleged in the statement of claim. The first paragraph alleges the conspiracy to be "to prevent the plaintiffs from obtaining cargoes for steamers owned by the plaintiffs." The word "prevent" is sufficiently wide to comprehend both lawful means and unlawful, but as I have already said in proof there is nothing but the competition with which I have dealt.

The second paragraph alleges that in pursuance of the conspiracy people were "bribed, coerced, and induced to agree to forbear and to forbear from shipping cargoes by the steamers of the plaintiffs." If the word "bribed" is satisfied by the offering lower freights and larger discounts, then that is proved; but then the word "bribed" is robbed of any legal significance. "Coerced" is not

justified by any evidence in the case and the word "induced" is absolutely neutral, and no unlawful inducement is proved. The third paragraph uses language such as "intention to injure the plaintiffs," "threats of stopping the shipment of homeward cargoes," and the like. But I ask myself whether if the indictment had set out the facts without using the ambiguous language to which I have referred in the statement of claim, it would have disclosed an indictable offense? I am very clearly of opinion it would not.

I am of opinion, therefore, that the whole matter comes round to the original proposition, whether a combination to trade, and to offer, in respect of prices, discounts, and other trade facilities, such terms as will win so large an amount of custom as to render it unprofitable for rival customers to pursue the same trade is unlawful, and I am clearly of opinion that it is not.

I think, therefore, that the appeal ought to be dismissed with costs, and I so move Your Lordships.

Concurring opinions were delivered by Lords WATSON, BRANWELL, MORRIS, FIELD and HANNEN.

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§ 7.—CONFLICTING RIGHTS. (c.)—FRAUDULENT INJURY TO BUSINESS.

VAN HORN v. VAN HORN.

(52 N. J. L. 284; 20 At. 485.—1890.)

The defendants, Amos H. Van Horn and Casper Soer, Jr., were summoned to answer James Van Horn, and Emma D. Van Horn, his wife, in tort, for a conspiracy or combination to break up the wife's separate business of selling fancy goods on consignment at Newark.

Two firms of wholesale jobbers in fancy and millinery goods had agreed, verbally, to supply her on credit with a stock of such goods, to be sold by her on commission, limiting the total amount to $2,500. One of said firms had, in pursuance of the agreement with her, sent $500 worth of goods, which were received and placed in her store for sale, and she was daily expecting the balance. With this prefa-

tory statement, the declaration charges that the defendants, maliciously intending to injure and drive the said Emma D. Van Horn out of business, and into public scandal, shame, and disgrace, and to injure her in her credit and business, and to prevent her from acquiring any profit or gain therefrom, or from continuing the same, did maliciously conspire, combine, and agree to prevent her from enjoying and continuing her business, and in pursuance of said conspiracy, etc., did entice into their store in Newark one of the plaintiff's employees, and by artful persuasion and threats induced her to tell where the plaintiff's stock of goods was purchased, telling her the stock would be taken from her, and the business closed up; and, in pursuance and in further performance of their unlawful intent and combination, endeavored to prevent the customers and friends of the plaintiff from dealings with her, by falsely and fraudulently representing to them that she would not be able to carry on her business, but would have to close up, as she was selling goods that did not belong to her, and living off the proceeds, instead of accounting therefor, and by sending threatening notes and messages to them designed to intimidate them from having any dealings with her, and did threaten to pursue her until she was ruined. That in further pursuance of such combination, and by means of fraud and deceit, they did persuade the said firm in New York to decline to complete their contract, and did prevail on them, by means of corrupt, fraudulent, and deceitful representations and statements as to the personal and business character and standing of the plaintiff, to remove the stock already supplied her, and refuse to deliver her other goods as agreed for, leaving her entirely without any stock to sell, or customers to purchase from her, by means whereof she was left without stock and credit with the said firms, and could not obtain goods from other parties, and was driven out of her business and occupation, and deprived of the profit and livelihood which she was making and daily increasing. To this declaration a general demurrer was filed, and joinder added.

SCUDDER, J. The merely formal parts of this declaration will not be considered on the general demurrer, but the whole will be examined to determine whether it sets forth in substance a legal cause of action. The case has been elaborately discussed by counsel, because the principles involved may affect other cases of even greater importance than this, and lead to serious complications

where actions are brought between rivals in business, or those who interfere with the ordinary course of trade to the detriment of others. A careful consideration of the subject has led me to the conclusion that this case is readily distinguishable from many that have been cited in the argument, and does not involve many of the questions that have been presented. It is not necessary to consider the office of the ancient writ of conspiracy, and the process by which, in time, it was superseded by the later and more efficacious action on the case for conspiracy, and the still more modern action for malicious prosecution. * * * It is an action on the case setting forth a malicious conspiracy, or confederation, with the means employed to effect its purpose, and the resulting damages to the plaintiff. No further specification is required than the general terms in which it is pleaded in the declaration.

We have not presented for determination in this pleading the vexed question whether an action will lie against a third person for the malicious procurement of the breach of a contract, if by such procurement damage was intended to result and did result to the plaintiff. Lumley v. Gye, 2 El. & Bl. 216; Bowen v. Hall, 6 Q. B. Div. 333. Here the whole pleading is based on the malicious conduct of the defendants in destroying the plaintiff's credit and patronage, and breaking up her business and livelihood. The case is, however, further distinguished from the cases cited above, and separated from the questions of difficulty involved in some of them, because here no breach of contract is alleged. There was no binding contract between the New York firms and the plaintiff upon which they could be sued for a breach. Where there is a suable contract between a contractor and contractee there is difficulty, in principle, in showing privity in another, or to make the person who procures a breach of the contract the proximate cause of injury. The party who breaks the contract, for whatever cause, whether by procurement of others or of his own volition, is primarily responsible to the other party; and the procurer, it would seem, can only be held responsible for the breach, where there is malice shown to the sufferer, giving a distinct cause of action for the malice which caused the breach of the contract resulting in damages to him.

The plaintiff Emma D. Van Horn, it is alleged, was selling goods on consignment from others, with the expectation of greater consignments in the future. If the consignors refuse to send the goods to her

it does not appear that she could have any remedy against them. They could send or recall them at pleasure. The complaint here is that the goods in the plaintiff's possession were recalled, and her advantageous arrangement for credit with the consignors ended by the fraudulent and malicious act of the defendants. If she have no remedy against the defendants, she can have none against others for the wrong which she claims she has suffered. The difference between this action and slander is well stated in Riding v. Smith, 1, Exch. Div. 91, where a slander against the wife was charged as having injured the husband's business. Her name was stricken from the record as a joint plaintiff, and the action was allowed to proceed by the husband, as a trader carrying on business, founded on an act done by the defendant which led to the loss of trade and custom by the plaintiff. It was maintainable on the ground that the injury to the plaintiff's business was the natural consequence of the words spoken, which would prevent persons resorting to the plaintiff's shop.

Upon the whole case presented in the declaration, Mogul Steamship Co. v. McGregor, 21 Q. B. Div. 544, 23 Q. B. Div. 598, is important to aid in preserving the distinction between injuries caused by mere rivalries in business, without the intention of ruining the trade of the plaintiff, and those where such intent is shown with personal malice towards him. In the first report, Lord Chief Justice COLERIDGE says: "It is too late to dispute, if I desired to do so, as I do not, that a wrongful and malicious combination to ruin a man in his trade may be ground for such an action as this." In the later report Lord Justice FRY, after a full statement of cases, says that no mere competition carried on for the purpose of gain, and without actual malice, is actionable, even though intended to drive the rival in trade away from his place of business, and though that intention be actually carried into effect. Lord ESHER, M. R., dissented. It was decided that the exclusion of the plaintiffs, rival freighters, from participation in a 5 per cent. rebate on freight on teas from China, not being through malice, but in competition to increase their own business, was not actionable. The basis of action seems here to be, as stated in the declaration, the fraudulent and malicious acts of the defendants in driving the plaintiff Emma D. Van Horn, out of her business; the statements of the means used to effect this purpose all combine to produce a single cause of action,

and are not objectionable for duplicity. But if there were duplicity in the pleadings, this is not ground for a general demurrer.

The demurrer should be overruled.[1]

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§ 7D.—INTIMIDATING THIRD PERSONS.

NAT. PROTECTIVE ASS'N. v. CUMMING.

(170 N. Y. 315; 63 N. E. 369.—1902.)

PARKER, C. J. The order of the Appellate Division should be affirmed, on the ground that the facts found do not support the judgment of the special term. In the discussion of that proposition, I shall assume that certain principles of law laid down in the opinion of Judge VANN are correct, namely: "It is not the duty of one man to work for another unless he has agreed to, and if he has so agreed, but for no fixed period, either may end the contract whenever he chooses. The one may work or refuse to work at will, and the other may hire or discharge at will. The terms of employment are subject to mutual agreement, without let or hindrance from any one. If the terms do not suit, or the employer does not please, the right to quit is absolute, and no one may demand a reason therefor. Whatever one man may do alone, he may do in combination with others, provided they have no unlawful object in view. Mere numbers do not ordinarily affect the quality of the act. Workingmen have the right to organize for the purpose of securing higher wages, shorter hours of labor, or improving their relations with their employers. They have the right to strike (that

[1] In West Virginia Trans. Co. v. Standard Oil Co., 50 W. Va. 611, 40 S. E. 591 (1901), the court said: "I understand the law to be as follows: One may without liability induce the customers of another to withdraw their custom from him, in the race of competition, in order that the former may himself get the custom, there being no contract; and it is no matter that such person is injured, and it is no matter that the other party was moved by express intent to injure him; motive being immaterial where the act is not unlawful. But where the act is not done under the right of competition, or under the cover of friendly, neighborly counsel, but wantonly or maliciously, with intent to injure another, it is actionable, if loss ensue. Nor is it material in the latter case that there was no binding contract between the business man and his customers. He cannot interfere, even for his own benefit, if there is a contract."

is, to cease working in a body by prearrangement until a grievance is redressed), provided the object is not to gratify malice or inflict injury upon others, but to secure better terms of employment for themselves. A peaceable and orderly strike, not to harm others, but to improve their own condition, is not in violation of law."

Stated in other words, the propositions quoted recognize the right of one man to refuse to work for another on any ground that he may regard as sufficient, and the employer has no right to demand a reason for it. But there is, I take it, no legal objection to the employee's giving a reason, if he has one, and the fact that the reason given is that he refuses to work with another who is not a member of his organization, whether stated to his employer or not, does not affect his right to stop work; nor does it give a cause of action to the workman to whom he objects, because the employer sees fit to discharge the man objected to, rather than lose the services of the objector. The same rule applies to a body of men, who, having organized, for purposes deemed beneficial to themselves, refuse to work. Their reasons may seem inadequate to others, but, if it seems to be in their interest as members of an organization to refuse longer to work, it is their legal right to stop. The reason may no more be demanded, as a right, of the organization than of an individual; but, if they elect to state the reason, their right to stop work is not cut off because the reason seems inadequate or selfish to the employer or to organized society. And if the conduct of the members of an organization is legal in itself, it does not become illegal because the organization directs one of its members to state the reason for its conduct.

The principles quoted above recognize the legal right of members of an organization to strike (that is, to cease working in a body by prearrangement until a grievance is redressed), and they enumerate some things that may be treated as the subject of a grievance, namely, the desire to obtain higher wages, shorter hours of labor, or improved relations with their employers; but this enumeration does not, I take it, purport to cover all the grounds which will lawfully justify members of an organization refusing, in a body and by prearrangement, to work. The enumeration is illustrative, rather than comprehensive; for the object of such an organization is to benefit all its members, and it is their right to strike, if need be, in order to secure any lawful benefit to the several members of the organization,—as, for instance, to secure the re-employment of a

member they regard as having been improperly discharged, and to secure from an employer of a number of them employment for other members of their organization who may be out of employment, although the effect will be to cause the discharge of other employees who are not members. And whenever the courts can see that a refusal of members of an organization to work with nonmembers may be in the interest of the several members, it will not assume, in the absence of a finding to the contrary, that the object of such refusal was solely to gratify malice, and to inflict injury upon such nonmembers.

A number of reasons for the action of the organization will at once suggest themselves in a case like this. One reason apparent from the findings in this case, as I shall show later, is the desire of the organization that its own members may do the work the nonmembers are performing. And another most important reason is suggested by the fact that these particular organizations, associations of steam fitters, required every applicant for membership to pass an examination testing his competency. Now, one of the objections sometimes urged against labor organizations is that unskillful workmen receive as large compensation as those thoroughly competent. The examination required by the defendant association tends to do away with the force of that objection as to them. And again, their restriction of membership to those who have stood a prescribed test must have the effect of securing careful as well as skillful associates in their work, and that is a matter of no small importance, in view of the state of the law, which absolves the master from liability for injuries sustained by a workman through the carelessness of a co-employee. So long as the law compels the employee to bear the burden of the injury in such cases, it cannot be open to question but that a legitimate and necessary object of societies like the defendant associations would be to assure the lives and limbs of their members against the negligent acts of a reckless co-employee; and hence it is clearly within the right of an organization to provide such a method of examination and such tests as will secure a careful and competent membership, and to insist that protection of life and limb requires that they shall not be compelled to work with men whom they have not seen fit to admit into their organization, as happened in the case of the plaintiff McQueed.

While I purpose to take the broader ground, which I deem

fully justified by the principles quoted, as well as the authorities, that the defendants had the right to strike for any reason they deemed a just one, and, further, had the right to notify their employer of their purpose to strike, I am unable to see how it is possible to deny the right of these defendant organizations and their members to refuse to work with nonmembers, when, in the event of injury by the carelessness of such co-employees, the burden would have to be borne by the injured, without compensation from the employer, and with no financial responsibility, as a general rule, on the part of those causing the injury; for it is well known that some men, even in the presence of danger, are perfectly reckless of themselves and careless of the rights of others, with the result that accidents are occurring almost constantly which snuff out the lives of workmen as if they were candles, or leave them to struggle through life maimed and helpless. These careless, reckless men are known to their associates, who not only have the right to protect themselves from such men, but, in the present state of the law, it is their duty, through their organizations, to attempt to do it, as to the trades affording special opportunities for mischief arising from recklessness. I know it is said in another opinion in this case that "workmen cannot dictate to employers how they shall carry on their business, nor whom they shall or shall not employ"; but I dissent absolutely from that proposition, and assert that, so long as workmen must assume all the risk of injury that may come to them through the carelessness of co-employees, they have the moral and legal right to say that they will not work with certain men, and the employer must accept their dictation or go without their services.

If it be true, as was recently intimated by the Supreme Court of Pennsylvania in Durkin v. Coal Co., 171 Pa. 193, 33 Atl. 237, 29 L. R. A. 808, 50 Am. St. Rep. 801, that an act of the legislature which undertakes to "reverse the settled law upon the subject, and declare that the employer shall be responsible for an injury to an employee resulting from the negligence of a fellow workman," is unconstitutional,—a doctrine from which I dissent (see Tullis v. Railroad Co., 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192), but which it is possible may receive the support of the courts,—then the only opportunity for protection, in the future as well as the present, to workmen engaged in dangerous occupations, is through organizations like these defendant associations, which restrict their memberships to careful and skillful men, and prohibit their members from

working with members of other organizations which maintain a lower standard or none at all. For the master's duty is discharged if the workman be competent, and for his recklessness, which renders his employment a menace to others, the master is not responsible. But I shall not further pursue this subject. My object in alluding to it is to emphasize the fact that there are other purposes for which labor organizations can be effectually used than those quoted above, and also because it is fairly inferable from the facts found that the members of plaintiff association were objectionable to defendants because not up to the latter's standards, so as to make them eligible for membership in defendant organizations, and that this was the motive for defendants' acts in holding a strike, and notifying their employer of their intention to do so. But whether this be so or not, when it can be seen from the facts found that such or other motives of advantage to themselves may have prompted defendants' action, a court which can review only upon the law certainly will not presume that another and an unlawful motive, and one not stated in the findings of fact, prompted the action of the organization and its members. In other words, this court cannot import into the findings of fact a fact that is not therein expressed. This is not a case of unanimous affirmance, but one of reversal; and, under section 1338 of the Code of Civil Procedure, we are to assume that the Appellate Division intended to affirm the facts as found by the trial court, and, having so affirmed them, it then reversed because they were insufficient in law to support the judgment. It is our duty, therefore, if we discover that the facts as actually found are insufficient to support the conclusion of law, to sustain the action of the Appellate Division in reversing the judgment. National Harrow Co. v. Bement & Sons, 163 N. Y. 505, 57 N. E. 764, and cases cited.

In Bowen v. Matheson, 14 Allen, 499, the court had before it on demurrer a declaration in an action where the defendants' business had been practically broken up, and it said: "In order to be good, the declaration must allege against the defendants the commission of illegal acts. Its allegations must be analyzed to ascertain whether they contain a sufficient statement of such acts." This was followed by an interesting analysis, which resulted in disclosing that no illegal act was alleged, notwithstanding the liberal use of such extravagant words and phrases as "maliciously conspiring together," and "fellow conspirators as aforesaid in pursuance of

their conspiracy as aforesaid," whereupon the demurrer was sustained, and a precedent created which should be followed in this case.

Now, before taking up the findings of fact for analysis in the light of the principles quoted above, as was done in Bowen's Case, and with the view of showing that they do not sustain the judgment of the special term, I wish to again call attention to the rules quoted, and particularly to so much of them as intimates that if the motive be unlawful, or be not for the good of the organization or some of its members, but prompted wholly by malice and a desire to injure others, then an act which would be otherwise legal becomes unlawful. To state it concretely, if an organization strikes to help its members, the strike is lawful. If its purpose be merely to injure nonmembers, it is unlawful. If the organization notifies the employer that its members will not work with nonmembers, and its real object is to benefit the organization and secure employment for its members, it is lawful. If its sole purpose be to prevent nonmembers working, then it is unlawful. I do not assent to this proposition, although there is authority for it. It seems to me illogical and little short of absurd to say that the everyday acts of the business world, apparently within the domain of competition, may be either lawful or unlawful according to the motive of the actor. If the motive be good, the act is lawful. If it be bad, the act is unlawful. Within all the authorities upholding the principle of competition, if the motive be to destroy another's business in order to secure business for yourself, the motive is good, but, according to a few recent authorities, if you do not need the business, or do not wish it, then the motive is bad; and some court may say to a jury, who are generally the triors of fact, that a given act of competition which destroyed A.'s business was legal if the act was prompted by a desire on the part of the defendant to secure to himself the benefit of it, but illegal if its purpose was to destroy A.'s business in revenge for an insult given. But for the purpose of this discussion I shall assume this proposition to be sound, for it is clear to me that, applying that rule to the facts found, it will appear that the Appellate Division order should be sustained.

While I shall consider every fact found by the learned trial judge, I shall consider the findings in a different order, because it seems to me the more logical order. He finds "that the defendants Cumming and Nugent, while acting in their capacity of walking delegates for their respective associations and members of the board

of delegates, caused the plaintiff McQueed and other members of the plaintiff association to be discharged by their employers from various pieces of work upon buildings in the course of erection, * * * by threatening the * * * employers that if they did not discharge the members of the plaintiff association, and employ the members of the Enterprise and Progress Associations in their stead, the said walking delegates would cause a general strike of all men of other trades employed on said buildings, and that the defendant Cumming, as such walking delegate, did cause strikes * * * in order to prevent the members of the plaintiff association from continuing with the work they were doing at the time the strike was ordered, and that said employers, by reason of said threats and the acts of the defendants Cumming and Nugent, discharged the members of the plaintiff association, and employed the members of the Enterprise and Progress Associations in their stead." Now there is not a fact stated in that finding which is not lawful, within the rules which I have quoted *supra*. Those principles concede the right of an association to strike in order to benefit its members; and one method of benefiting them is to secure them employment,—a method conceded to be within the right of an organization to employ. There is no pretense that the defendant associations or their walking delegates had any other motive than one which the law justifies,—of attempting to benefit their members by securing their employment. Nowhere throughout that finding will be found even a hint that a strike was ordered, or a notification given of the intention to order a strike, for the purpose of accomplishing any other result than that of securing the discharge of the members of the plaintiff association, and the substitution of members of the defendant associations in their place. Such a purpose is not illegal within the rules laid down in the opinion of Judge VANN, nor within the authorities cited therein. On the contrary, such a motive is conceded to be a legal one. It is only where the sole purpose is to do injury to another, or the act is prompted by malice, that it is insisted that the act becomes illegal. No such motive is alleged in that finding. It is not hinted at. On the contrary, the motive which always underlies competition is asserted to have been the animating one. It is beyond the right and the power of this court to import into that finding, in contradiction of another finding or otherwise, the further finding that the motive which prompted the conduct of defendants was an unlawful one, prompted by malice, and a desire to do injury

to plaintiffs, without benefiting the members of the defendant associations. I doubt if it would ever have occurred to any one to claim that there was anything in that finding importing a different motive from that specially alleged in the finding, had not the draftsman characterized the notice given to the employers by the associations of their intention to strike as "threats." The defendant associations, as appears from the finding quoted, wanted to put their men in the place of certain men at work who were nonmembers, working for smaller pay, and they set about doing it in a perfectly lawful way. They determined that if it were necessary they would bear the burden and expense of a strike to accomplish that result, and in so determining they were clearly within their rights, as all agree. They could have gone upon a strike without offering any explanation until the contractors should have come in distress to the officers of the associations, asking the reason for the strike. Then, after explanations, the nonmembers would have been discharged, and the men of defendant associations sent back to work. Instead of taking that course, they chose to inform the contractors of their determination, and the reason for it. It is the giving of this information—a simple notification of their determination, which it was right and proper and reasonable to give—that has been characterized as "threats" by the special term, and which has led to no inconsiderable amount of misunderstanding since. But the sense in which the word was employed by the court is of no consequence, for the defendant associations had the absolute right to threaten to do that which they had the right to do. Having the right to insist that plaintiff's men be discharged, and defendants' men put in their place, if the services of the other members of the organization were to be retained, they also had the right to threaten that none of their men would stay unless their members could have all the work there was to do.

The findings further stated that the defendants Cumming and Nugent were the walking delegates of the defendant associations, and as such were members of the board of delegates of the building trades in New York, and were therefore in control of the matters in their respective trades. The trial court also found "that the defendant Cumming threatened to cause a general strike against the plaintiff association and against the plaintiff McQueed wherever he found them at work, and that he would not allow them to work at any job in the city of New York, except some small jobs where

the men of the Enterprise Association were not employed, and that he and the defendant Nugent threatened to drive the plaintiff association out of existence." Now, this finding should be read in connection with and in the light of the other findings which I have already read and commented on, and which show that the purpose of the strike was to secure the employment of members of the defendant associations in the places filled by the members of plaintiff's association, who were willing to work for smaller wages, —a perfectly proper and legitimate motive, as we have seen. But if the other findings be driven from the mind while considering this one, which the opinions of the Appellate Division indicate was not justified by the evidence, it will be found that it fairly means no more than that the defendant associations did not purpose to allow McQueed and the members of his association to work upon any jobs where members of defendant associations were employed; that they were perfectly willing to allow them to have small jobs, fitted, perhaps, for men who were willing to work for small wages, but that the larger jobs, where they could afford to pay and would pay the rate of wages demanded by defendant associations, they intended to secure for their members alone,—a determination to which they had a perfect right to come, as is conceded by the rules which I have quoted. Having reached that conclusion, defendants notified McQueed, who had organized an association when he failed to pass the defendants' examination, that they would prevent him and the men of his association from working on a certain class of jobs. They did not threaten to employ any illegal method to accomplish that result. They notified them of the purpose of the defendants to secure this work for themselves, and to prevent McQueed and his associates from getting it, and in doing that they but informed them of their intention to do what they had a right to do; and, when a man purposes to do something which he has the legal right to do, there is no law which prevents him from telling another, who will be affected by his act, of his intention. A man has a right, under the law, to start a store, and to sell at such reduced prices that he is able in a short time to drive the other storekeepers in his vicinity out of business, when, having possession of the trade, he finds himself soon able to recover the loss sustained while ruining the others. Such has been the law for centuries. The reason, of course, is that the doctrine has generally been accepted that free competition is worth more to society than it costs, and that on this ground the

infliction of damages is privileged. Com. v. Hunt, 4 Metc. (Mass.) 111, 134, 38 Am. Dec. 346. Nor could this storekeeper be prevented from carrying out his scheme because, instead of hiding his purpose, he openly declared to those storekeepers that he intended to drive them out of business in order that he might later profit thereby. Nor would it avail such storekeepers, in the event of their bringing an action to restrain him from accomplishing their ruin by underselling them, to persuade the trial court to characterize the notification as a "threat," for on review the answer would be, "A man may threaten to do that which the law says he may do, provided that, within the rules laid down in those cases, his motive is to help himself." A labor organization is endowed with precisely the same legal right as is an individual to threaten to do that which it may lawfully do.

Having finished the discussion of the facts, I reiterate that, within the rules of law I have quoted, it must appear, in order to make out a cause of action against these defendants, that in what they did they were actuated by improper motives,—by a malicious desire to injure the plaintiffs. There is no such finding of fact, and there is no right in this court to infer it if it would, and, from the other facts found, it is plain that it should not if it could.

The findings conclude with a sentence which commences as follows: "I find that the threats made by the defendants, and the acts of the said walking delegates in causing the discharge of the members of the plaintiff association by means of threats of a general strike of other workmen, constitute an illegal combination and conspiracy." That is not a finding of fact, but a conclusion of law, that the trial court erroneously, as I think, attempted to draw from the facts found, which I have already discussed, and which clearly, in my judgment, require this court to hold that the defendants acted within their legal rights.

In the last analysis of the findings, therefore, it appears that they declare that members of the organizations refused to work any longer, as they lawfully might; that they threatened to strike, which was also within their lawful right, but without any suggestion whatever in the findings that they threatened an illegal or unlawful act. And such findings are claimed to be sufficient to uphold a judgment that absolutely enjoins the defendant associations and their members from striking. This is certainly a long step in advance of any decision brought to my attention.

I have refrained from discussing the authorities, because it seemed unnecessary, for the reason already stated in this opinion. But it seems not out of place to suggest that the decisions of the English courts upon questions affecting the rights of workmen ought at least to be received with caution, in view of the fact that the later ones are largely supported by early precedents which were entirely consistent with the policy of the statute law of England, but are hostile not only to the statute law of this country, but to the spirit of our institutions. In support of this view, reference to a few early statutes of England will be made. The statutes (for there are two) of "Laborers," passed in 1349 and 1350 (23 Edw. III. c. 1, and 25 Edw. III. stat. 1), provided "that every man and woman of what condition he be, free or bond, able in body, and within the age of three score years," and not having means of his own, "if he in convenient service (his estate considered) be required to serve, he shall be bounden to serve him which so shall him require." And the statutes provided that, in case of refusal to serve, punishment by imprisonment might be inflicted, and that the laborers should take the customary rate of wages, and no more. These statutes not only regulated the wages of laborers and mechanics, but they confined them to their existing places of residence, and required them to swear to obey the provisions of the statutes. Sir James Fitzjames Stephen, in his History of the Criminal Law of England (volume 3, p. 204,) says, "The main object of these statutes was to check the rise in wages consequent upon the great pestilence called the 'Black Death.'"

Nearly 200 years later, and in 1548, a more general statute was passed, which forbade all conspiracies and covenants of artificers, workmen, or laborers "not to make or do their work but at a certain price or rate," or for other similar purposes, under the penalty, on a third conviction, of the pillory and loss of an ear, and to "be taken as a man 'infamous.'" 2 & 3 Edw. VI. c. 15. Fourteen years later the prior statutes were to some extent amended and consolidated into a longer act, entitled "An act containing divers orders for artificers, laborers, servants of husbandry, and apprentices." It provided, in effect, that all persons able to work as laborers or artificers, and not possessed of independent means or other employments, are bound to work as artificers or laborers on demand. The hours of work are fixed; power is given to the justices in their next session after Easter to fix the wages to be paid to mechanics and

laborers; elaborate rules are laid down as to apprenticeship; and it further provides that for the future no one is to "set up, occupy, use or exercise any craft, mystery or occupation now used" until he has served an apprenticeship of seven years. 5 Eliz. c. 4. This statute remained in force practically for a long period of time, and was not formally repealed until the year 1875. In the year 1720 an act was passed declaring all agreements between journeymen tailors "for advancing their wages, or for lessening their usual hours of work" to be null and void, and subjecting persons entering into such an agreement to imprisonment, with or without hard labor, for two months. 7 Geo. I. stat. 1. c. 13. Similar enactments were passed as to employees in other manufactures and trades. The act of 1800 (40 Geo. III. c. 106) provided for a penalty of three months' imprisonment without hard labor, or two months with hard labor, for every journeyman, workman, or other person who "enters into any combination to obtain an advance of wages, or lessen or alter the hours of work * * * or who hinders any employer from employing any person as he thinks proper, or who being hired refuses without any just or reasonable cause to work with any other journeyman or workman employed or hired to work." The same penalty is inflicted upon persons who attend meetings held for the purpose of collecting money to further such effort, and the act also makes it an offense to assist in maintaining men who are on strike. This statute, as well as others referred to, have at last been swept away, but necessarily their influence has been not inconsiderable in shaping the decisions of the courts of England.

The order should be affirmed, and judgment absolute ordered for defendants on the plaintiffs' stipulation, with costs.

VANN, J. (dissenting). The National Protective Association of Steam Fitters and Helpers is a domestic corporation organized to furnish competent steam fitters and helpers in all branches to the general public, to protect its members in the pursuit of that business, and for other purposes. The plaintiff Charles McQueed is a member of that corporation, and sues for the benefit of himself and his fellow members. The defendant O'Brien is the president of the board of delegates; the defendant Duff is the treasurer of the Enterprise Association of Steam Fitters; the defendant Mallaney is the treasurer of the Progress Association of Steam Fitters and Helpers; the defendant Cumming is an officer known as the "walk-

ing delegate" of the Enterprise Association; the defendant Nugent is the walking delegate of the Progress Association; and both Cumming and Nugent are *ex officio* members of the board of delegates. Each of these associations is unincorporated, and consists of more than seven members. This action is brought to restrain the defendants from preventing the employment of the plaintiff corporation or its members, and from coercing their discharge by any employer through threats, strikes, or otherwise, and to recover damages, with other relief. The issues joined by the answers of the several defendants were tried at special term. The trial justice adopted the short form of decision, but, in stating the grounds upon which he proceeded, found specifically "that the defendants have entered into a combination which, in effect, prevents, and will continue to prevent, the plaintiff McQueed and the other members of the plaintiff association from working at his or their trade in the city of New York; * * * that the defendant Cumming threatened to cause a general strike against the plaintiff association and against the plaintiff McQueed wherever he found them at work, and that he would not allow them to work at any job in the city of New York, except some small jobs where the men of the Enterprise Association were not employed, and that he and the defendant Nugent threatened to drive the plaintiff association out of existence; * * * that the defendants Cumming and Nugent, while acting in their capacity of walking delegates for their respective associations, and members of the board of delegates, caused the plaintiff McQueed and other members of the plaintiff association to be discharged by their employers from various places of work upon buildings in the course of erection [naming three different employers who were erecting buildings at different places in the boroughs of Brooklyn and Manhattan], by threatening the said employers that if they did not discharge the members of the plaintiff association, and employ the members of the Enterprise Progress Association in their stead, the said walking delegates would cause a general strike of all men of other trades employed on said buildings, and that the defendant Cumming, as such walking delegate, did cause strikes * * * in order to prevent the members of the plaintiff association from continuing with the work they were doing at the time the strike was ordered, and that the said employers, by reason of said threats and the acts of the defendants Cumming and Nugent, discharged the members of the plaintiff association, * * * and employed the

members of the Enterprise and Progress Associations in their stead; * * * that the threats made by the defendants, and the acts of said walking delegates in causing the discharge of the members of the plaintiff association by means of threats of a general strike of other working men, constituted an illegal combination and conspiracy, injured the plaintiff association in its business, deprived its members of employment and an opportunity to labor, prevented them from earning their livelihood in their trade or business. * * *" A judgment was directed and entered restraining the defendants from "preventing the work, business, or employment of the plaintiff corporation, or any of its members, in the city of New York or elsewhere, and from coercing or obtaining, by command, threats, strikes, or otherwise, the dismissal or discharge by any employer, contractor, or owner of the members of the plaintiff corporation, or the plaintiff McQueed, or any or either of them, from their work, employment, or business, or in any wise interfering with the lawful business or work of the plaintiff corporation or of its members. But the defendants are not, nor is any one of them, enjoined and restrained from refusing to work with the plaintiff or any member of the plaintiff corporation."

The Appellate Division, according to its order, which is the only evidence of its action that we can consider, did not reverse upon a question of fact; and a reversal upon the law, only, is an affirmance of the facts found, which are thus placed beyond our control, as there was some evidence to support the findings. People v. Adirondack Ry. Co., 160 N. Y. 225, 235, 54 N. E. 689; Code Civ. Proc. § 1338. Thus we have before us a controversy, not between employer and employee, but between different labor organizations, wherein one seeks to restrain the others from driving its members out of business, and absolutely preventing them from earning a living by working at their trade, through threats, made to the common employer of members of all the organizations, to destroy his business unless he discharged the plaintiff's members from his employment. The primary question is whether the action of the defendants was unlawful, for a lawful act done in a lawful manner cannot cause actionable injury. It is not the duty of one man to work for another unless he has agreed to, and if he has so agreed, but for no fixed period, either may end the contract whenever he chooses. The one may work or refuse to work at will, and the other may hire or discharge at will. The terms of employment are subject to mutual

agreement, without hindrance from any one. If the terms do not suit, or the employer does not please, the right to quit is absolute, and no one may demand a reason therefor. Whatever one man may do alone, he may do in combination with others, provided they have no unlawful object in view. Mere numbers do not ordinarily affect the quality of the act. Workingmen have the right to organize for the purpose of securing higher wages, shorter hours of labor, or improving their relations with their employers. They have the right to strike (that is, to cease working in a body by prearrangement until a grievance is redressed), provided the object is not to gratify malice, or inflict injury upon others, but to secure better terms of employment for themselves. A peaceable and orderly strike, not to harm others, but to improve their own condition, is not violation of law. They have the right to go farther, and to solicit and persuade others, who do not belong to their organization, and are employed for no fixed period, to quit work, also, unless the common employer of all assents to lawful conditions, designed to improve their material welfare. They have no right, however, through the exercise of coercion, to prevent others from working. When persuasion ends, and pressure begins, the law is violated; for that is a trespass upon the rights of others, and is expressly forbidden by statute. Pen. Code, § 168. They have no right, by force, threats, or intimidation, to prevent members of another labor organization from working, or a contractor from hiring them or continuing them in his employment. They may not threaten to cripple his business unless he will discharge them, for that infringes upon liberty of action, and violates the right which every man has to conduct his business as he sees fit, or to work for whom and on what terms he pleases. Their labor is their property, to do with as they choose; but the labor of others is their property, in turn, and is entitled to protection against wrongful interference. Both may do what they please with their own, but neither may coerce another into doing what he does not wish to with his own. The defendant associations made their own rules and regulations, and the plaintiff corporation did the same. Neither was entitled to any exclusive privilege, but both had equal rights according to law. The defendants could not drive the plaintiff's members from the labor market absolutely, and the plaintiff could not drive the defendants' members therefrom. The members of each organization had the right to follow their chosen calling without unwarrant-

able interference from others. Public policy requires that the wages of labor should be regulated by the law of competition and of supply and demand, the same as the sale of food or clothing. Any combination to restrain "the free pursuit in this state of any lawful business," in order "to create or maintain a monopoly," is expressly prohibited by statute, and an injunction is authorized to prevent it. In re Davies, 168 N. Y. 89, 96, 61 N. E. 118; Laws 1897, c. 383; Laws 1899, c. 690.

A combination of workmen to secure a lawful benefit to themselves should be distinguished from one to injure other workmen in their trade. Here we have a conspiracy to injure the plaintiffs in their business, as distinguished from a legitimate advancement of the defendants' own interests. While they had the right by fair persuasion to get the work of the plaintiff McQueed, for instance, they had no right, either by force or by threats, to prevent him from getting any work whatever, or to deprive him of the right to earn his living by plying his trade. Competition in the labor market is lawful, but a combination to shut workmen out of the market altogether is unlawful. One set of laborers, whether organized or not, has no right to drive another set out of business, or prevent them from working for any person upon any terms satisfactory to themselves. By threatening to call a general strike of the related trades, the defendants forced the contractor to discharge competent workmen who wanted to work for him, and whom he wished to keep in his employment. They conspired to do harm to the contractor in order to compel him to do harm to the plaintiffs, and their acts in execution of the conspiracy caused substantial damage to the members of the plaintiff corporation. While no physical force was used, the practical effect was that members of one labor organization drove the members of another labor organization out of business, and deprived them of the right to labor at their chosen vocation. Depriving a mechanic of employment by unfair means is the same in principle as depriving a tradesman of his customers by unfair means, which has always been held a violation of law. A conspiracy is a combination to do an illegal act by legal means, or any act by illegal means. Here the means used were illegal, because they tended and were designed to injure a man in his business without lawful excuse. A threat, whether made by one alone, or by many acting in combination, to injure a man in his business unless he will conduct it in a way that he does not wish to, is a

tortious act, because it interferes with business freedom; and if it results in injury it is actionable. Every man has the right to carry on his business in any lawful way that he sees fit. He may employ such men as he pleases, and is not obliged to employ those whom, for any reason, he does not wish to have work for him. He has the right to the utmost freedom of contract and choice in this regard, and interference with that freedom is against public policy, because it tends not only to destroy competition, but, in a broad sense, to deprive a man of both liberty and property. People v. Gillson, 109 N. Y. 389, 399, 17 N. E. 343, 4 Am. St. Rep. 465; Slaughter House Cases, 16 Wall. 116, 122, 21 L. Ed. 394. Threatening, molesting, intimidating, and obstructing others in their trade or calling is contrary to law, because it is in violation of personal rights, in restraint of trade, and injurious to society. It tends to force able-bodied and competent workmen into idleness, and prevent them from helping to do the work of the country. Workmen cannot dictate to employers how they shall carry on their business, nor whom they shall or shall not employ. The plaintiff's men had the right to work without molestation by members of other labor unions, exercised either directly against themselves, or indirectly through their employers. They had the right to have their relations with their employers left undisturbed, and this right was intentionally invaded by the defendants, without lawful justification. The object was evil, for it was not to compete for employment, by fair means, but to exclude rivals from employment altogether by unfair means. The law gives all men an equal chance to live by their own labor, and does not permit one labor union to seize all the chances, by compelling employers to refuse employment to the members of all other unions. The plaintiffs do not ask for protection against competition, but from "malicious and oppressive interference" with their right to work at their trade.

The object of the defendants was not to get higher wages, shorter hours, or better terms for themselves, but to prevent others from following their lawful calling. Thus one of the defendants said to the plaintiff McQueed: "I will strike against your men wherever I find them, and not allow them to work on any job in the city, except some small place where the Enterprise men are not employed." The same man said to one of the contractors that he could not have the plaintiff's men in his employment, and unless they were discharged he would order a "general strike of the whole

building." They were discharged accordingly, although the contractor testified that they were good workmen, that their work was satisfactory, and that he had no reason for discharging them, other than the threats made. Another contractor testified that two of the defendants told him that he must take the plaintiff's men off and put their men on, "or else the whole building would be tied up, as they would not allow the other men to work." The usual discharge followed, although the men were satisfactory to their employer. The same witness testified that "Mr. Cumming would neither allow my men to work, nor would he allow his men to go to work until the time had been paid for between the interval they struck and the time they were to go to work again." A member of the plaintiff corporation swore that "Mr. Cumming told us that, if he ever found us on a job in the vicinity of New York, he would strike it by order of the board of delegates. He said they would not allow us to work on any job, except it was a small job,—a cheap job,—and he allowed us to do it." The threat was repeated in substance to the employer, who discharged the witness, and he was not employed on the building afterwards. There was other evidence to the same effect, and, although the defendants denied making these threats, the trial judge accepted the version of the plaintiff's witnesses, and hence we must do the same. I assume, therefore, that the defendants caused the discharge of the plaintiff's men by threatening to cripple their employer's business unless he discharged them, and that they also molested them by threatening to prevent them from working at their trade in the city of New York, by calling a general strike of all trades on any building where they might be employed. The action of the defendants was wrongful and malicious, and their object was to force men who had learned a trade to abandon it and take up some other pursuit. There is no finding that the defendants maintain a higher standard of skill than the plaintiffs.

It may be argued that the employers were not obliged to yield to these threats, and this is true; but noncompliance meant ruin to them, for their work would be completely tied up and their business paralyzed. A threat, with ruin behind it, may be as coercive as physical force. The effect of such threats upon men of ordinary nerve is well known. They could not perform their contracts, and would thus be subjected to great loss. Hence, against their will, they yielded to unlawful demands. Personal liberty was interfered

with through coercion of the will. Some of them knew from experience as the record shows, that the military discipline of the defendant organizations practically compelled instant obedience of an order to strike. When an association is so strong and its discipline so perfect that its orders to strike are equivalent to the commands of an absolute monarch, the effect is the same as the use of physical force. 1 Tied. Cont. Pers. & Prop. p. 433; Erle, Trade Unions, 12, 105. The purposes of the defendants, as well as the methods pursued by them, were unlawful, and authorized the injunction granted by the trial court in order to prevent irreparable injury and a multiplicity of suits. This was conceded in Reynolds v. Everett, 144 N. Y. 189, 39 N. E. 72, and demonstrated in Davis v. Zimmerman, 91 Hun, 489, 36 N. Y. Supp. 303. Each man would be compelled to bring a separate action every time he was discharged. An action at law, especially against an unincorporated association, would ordinarily do no good, and in most cases ruin would anticipate relief. Damages would not adequately redress the wrong, and the mere statement of the facts shows the impossibility of adequately measuring the damages in this class of actions. That damages were sustained is clear, but what evidence can prove the amount, and what intelligence is keen enough to resolve them into dollars and cents? Unless equity will take jurisdiction, the wrong done is practically without a remedy. Unlawful combinations of capital are restrained without hesitation, and the same test of illegality should be applied to combinations of labor; for both are equal before the law, and both are covered by the same statute (Laws 1897, c. 383; Laws 1899, c. 690). The prejudice said to exist in some minds against interference by courts of equity in labor disputes should not be heeded; for if, upon well-settled principles, the courts have jurisdiction, they must exercise it, or refuse to do their duty. Public opinion may express itself in legislation, but not in judicial decisions. The fact that a lawful strike inflicts injury upon the employer is not controlling. As was said by a recent writer upon the subject: "The courts recognize the right of the workingmen to combine together for the purpose of bettering their condition, and, in endeavoring to attain their object, they may inflict more or less inconvenience and damages upon the employer; but a threat to strike unless their wages are advanced is something very different from a threat to strike unless workmen who are not members of the combination are discharged. In either case the inconvenience and

damage inflicted upon the employer is the same; but in the one case the means used are to attain a legitimate purpose, namely, the advancement of their own wages, and the injury inflicted is no more than is lawfully incidental to the enjoyment of their own legal rights. In the other case the object sought is the injury of a third party; and while it may be argued that indirectly the discharge of the nonunion employee will strengthen and benefit the union, and thereby indirectly benefit the union workmen, the benefit to the members of the combination is so remote, as compared to the direct and immediate injury inflicted upon the nonunion workmen, that the law does not look beyond the immediate loss and damages to the innocent parties, to the remote benefits that might result to the union." 1 Eddy, Comb'ns. 416.

The conclusions I have announced are supported by the weight of authority in this country and in England. The leading case in this state is controlling in principle, and requires a reversal of the order appealed from. Curran v. Galen, 152 N. Y. 33, 46 N. E. 297. The plaintiff in that case alleged in his complaint that the defendants wrongfully conspired to injure him and take away his means of earning a livelihood; that they threatened to accomplish this unless he would join their association; that in pursuance of the conspiracy, "upon plaintiff's refusing to become a member of said association," the defendants "made complaint to the plaintiff's employers, and forced them to discharge him from their employ, and, by false and malicious reports in regard to him, sought to bring him into ill repute with members of his trade and employers, and to prevent him from prosecuting his trade and earning a livelihood." The answer set forth an agreement between a brewer's association and a labor organization, of which defendants were members, to the effect that all employees of the brewery companies belonging to the former should be members of the latter, and that no employee should work for a longer period than four weeks without becoming a member. It was further alleged that the plaintiff was retained in the employment of one of the brewing companies for more than four weeks after he was notified of the provisions of said agreement requiring him to become a member of the local assembly; that the defendants requested him to become a member, and, on his refusal to comply, they, through their committee, notified the officers of said company that the plaintiff, after repeated requests, had refused for more than four weeks to become

a member of said assembly; and that they did so solely in pursuance of said agreement, and in accordance with the terms thereof, without intent or purpose to injure plaintiff in any way. The plaintiff demurred to this defense upon the ground that it was insufficient, in law, upon the face thereof. The demurrer was sustained in all the courts. 77 Hun, 610, 28 N. Y. Supp. 1134; 152 N. Y. 33, 46 N. E. 297. All the judges who sat in this court united with Judge Gray in saying that: "Public policy and the interests of society favor the utmost freedom in the citizen to pursue his lawful trade or calling, and if the purpose of an organization or combination of workingmen be to hamper or to restrict that freedom, and, through contracts or arrangements with employers, to coerce other workingmen to become members of the organization, and to come under its rules and conditions, under the penalty of the loss of their position and of deprivation of employment, then that purpose seems clearly unlawful, and militates against the spirit of our government and the nature of our institutions. The effectuation of such a purpose would conflict with that principle of public policy which prohibits monopolies and exclusive privileges. It would tend to deprive the public of the services of men in useful employment and capacities. It would, to use the language of Mr. Justice BARRETT in People v. Smith, 5 N. Y. Cr. R., at page 513, 'impoverish and crush a citizen for no reason connected in the slightest degree with the advancement of wages or the maintenance of the rate.'" The plaintiff, in a very recent case in England, employed nonunion men, and after trying in vain to have them admitted to the union, was told by its president that unless he discharged them his meat would be stopped at one Munce's, who had been getting about £30 worth weekly from him for 20 years, although there was no permanent contract between them. Upon his refusing to discharge, the defendants, who were officers and members of the union, threatened to instruct Munce's employees to cease work unless he complied with their request. The plaintiff still refused, whereupon Munce informed him that he need not send any more meat unless he arranged with the union, as his men had been ordered to quit work, and thereupon Munce ceased to deal with him. There was a recovery by the plaintiff, which was sustained by all the appellate courts. Leathem v. Craig [1899] 2 Ir. R. 667; Quinn v. Leathem [1901] App. Cas. 495. Five concurring opinions were written in the house of lords, which unanimously held that "a combination of two or more, without justification or

excuse, to injure a man in his trade by inducing his customers or servants to break their contracts with him, or not to deal with him or continue in his employment, is, if it results in damage to him, actionable." The earlier case of Allen v. Flood [1898] App. Cas. 1, upon which the Appellate Division relied in rendering the judgment now before us, was carefully limited and explained, if not virtually overruled. The English cases were so thoroughly reviewed that it is unnecessary to make further reference to them. Among other things, it was said: "He [referring to the plaintiff] was at liberty to earn his own living in his own way, provided he did not violate some special law prohibiting him from so doing, and provided he did not infringe the rights of other people. This liberty involved liberty to deal with other persons who were willing to deal with him. This liberty is a right recognized by law. Its correlative is the general duty of every one not to prevent the free exercise of this liberty, except so far as his own liberty of action may justify him in so doing. But a person's liberty or right to deal with others is nugatory unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him. If such interference is justifiable in point of law, he has no redress. Again, if such interference is unlawful, the only person who can sue in respect of it is, as a rule, the person immediately affected by it. Another who suffers by it has usually no redress. The damage to him is too remote, and it would be obviously practically impossible and highly inconvenient to give legal redress to all who suffer from such wrongs. But if the interference is wrongful, and is intended to damage a third person, and he is damaged in fact,—in other words, if he is wrongfully and intentionally struck at through others and is thereby damnified,—the whole aspect of the case is changed. The wrong done to others reaches him; his rights are infringed, although indirectly; and damage to him is not remote or unforeseen, but is the direct consequence of what has been done. Our law, as I understand it, is not so defective as to refuse him a remedy by an action under such circumstances." This decision was not founded upon ancient statutes, as some of the early English cases are, but upon the common law. See, also, the opinion in Taff Vale Ry. Co. v. Amalgamated Soc. [1901] App. Cas. 431, which had not been published when the judgment in Quinn v. Leathem was pronounced.

The position of the federal courts and those of most of the states

is to the same effect. Steamship Co. v. McKenna (C. C.) 30 Fed. 48; Casey v. Typographical Union (C. C.) 45 Fed. 135, 12 L. R. A. 193; Hopkins v. Stave Co., 28 C. C. A. 99, 83 Fed. 916; In re Debs, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092; Plant v. Woods, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330; State v. Donladson, 32 N. J. Law, 151, 90 Am Dec. 649; Barr v. Essex Trades Council, 53 N. J. Eq. 101, 30 Atl. 881; Printing Co. v. Howell, 26 Or. 527, 38 Pac. 547, 28 L. R. A. 464, 46 Am. St. Rep. 640; State v. Glidden, 55 Conn. 46, 8 Atl. 890, 3 Am. St. Rep. 23; Crump's Case, 84 Va. 927, 6 S. E. 620, 10 Am. St. Rep. 895; State v. Stewart, 59 Vt. 273, 9 Atl. 559, 59 Am. Rep. 710; Doremus v. Hennessy, 62 Ill. App. 391; State v. Huegin (Wis.) 85 N. W. 1046; Chipley v. Atkinson, 23 Fla. 206, 1 South. 934, 11 Am. St. Rep. 367; Lucke v. Cutters' and Trimmers' Assembly, 77 Md. 396, 26 Atl. 505, 19 L. R. A. 408, 39 Am. St. Rep. 421; Murdock v. Walker, 152 Pa. 595, 25 Atl. 492, 34 Am. St. Rep. 678; Beck v. Protective Union, 118 Mich. 497, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. Rep. 421. I add to the discussion of the common law governing the subject a quotation from the statute against crimes in this state, as indicating the policy of the law: "If two or more persons conspire * * * to prevent another from exercising a lawful trade or calling, or doing any other lawful act, by force, threats, intimidation, or by interfering or threatening to interfere with tools, implements or property, belonging to or used by another, or with the use or employment thereof, * * * each of them is guilty of a misdemeanor." Pen. Code, § 168.

I think that the action of the defendants was unlawful and was properly restrained, but the injunction, in the form granted, is too broad, and requires modification. It prevents the defendants "from coercing or obtaining by command, threats, strikes, or otherwise, the dismissal or discharge by any employer, contractor, or owner, of the members of the plaintiff corporation," etc. It is not limited to coercion, but prevents the defendant from obtaining, not simply by command, threats, etc., but by any means, the discharge of the plaintiffs. This might prevent fair persuasion or solicitation, which the defendants may resort to. While this might have been corrected by motion at special term, for the decision of the trial justice does not warrant it, it may be corrected upon appeal.

The order of the Appellate Division, so far as appealed from, should be reversed, and the judgment of the special term modified by

striking out the words "or otherwise" therefrom, and, as modified, affirmed, with costs to the appellants in all courts.

O'BRIEN and HAIGHT, JJ. (GRAY, J. in memorandum), concur with PARKER, C. J. BARTLETT and MARTIN, J. J. concur with VANN, J.

Ordered accordingly.

OLD DOM. S. S. CO. v. McKENNA.

(30 Fed. R. 48.—1887.)

BROWN, J. This action was brought to recover $20,000 damages, alleged to have been sustained by the plaintiff through the unlawful action of the defendants in the recent strike of the 'longshoremen, and in their attempt to boycott the plaintiff in its business as a common carrier. The defendants are alleged to constitute or to style themselves an "Executive Board of the Ocean Association of the 'Longshoremen's Union." At the time of the commencement of the action they were arrested and held to bail under orders of arrest issued in conformity with the state practice.

The defendants now move, upon the plaintiff's papers, only to vacate the order of arrest, on the ground that the material facts charged are alleged on information and belief only, without a sufficient statement of the sources of information; and the facts stated do not make out a *prima facie* case; that it appears that the defendants were acting within their legal rights, and that the plaintiff's loss, if any, is *damnum absque injuria;* and that, at best, the plaintiff's case is so doubtful that the order of arrest should not be sustained.

I have carefully considered the elaborate arguments of counsel, and examined the numerous authorities referred to. For lack of time I can only state my conclusions:

1. All the material averments are either stated positively or the source of information is sufficiently indicated.

2. The facts stated in the complaint and affidavit constitute a

legal cause of action against all the defendants for the actual damages suffered, for the following reasons:

(*a*) The plaintiff was engaged in the legal calling of common carrier, owning vessels, lighters and other craft used in its business, in the employment of which numerous workingmen were necessary, who, as the complaint avers, were employed "upon terms as to wages which were just and satisfactory."

(*b*) The defendants, not being in the plaintiff's employ, and without any legal justification, so far as appears,—a mere dispute about wages, the merits of which are not stated, not being any legal justification,—procured plaintiff's workmen in this city and in Southern ports to quit work in a body, for the purpose of inflicting injury and damage upon the plaintiff until it should accede to the defendants' demands, and pay the Southern negroes the same wages as New York 'longshoremen, which the plaintiff was under no obligation to grant; and such procurement of workmen to quit work, being designed to inflict injury on the plaintiff, and not being justified, constituted in law a malicious and illegal interference with the plaintiff's business, which is actionable.

(*c*) After the plaintiff's workmen, through the defendants' procurement, had quit work, the defendants, for the further unlawful purpose of compelling the plaintiff to pay such a rate of wages as they might demand, declared a boycott of the plaintiff's business and attempted to prevent the plaintiff from carrying on any business as common carrier, or from using or employing its vessels, lighters, etc., in that business, and endeavored to stop all the dealings of other persons with the plaintiff by sending threatening notices or messages to its various customers and patrons, and to the agents of various steamship lines, and to wharfingers and warehousemen usually dealing with the plaintiff, designed to intimidate them from having any dealings with it through threats of loss and expense in case they dealt with plaintiff by receiving, storing or transmitting its goods or otherwise; and various persons were deterred from dealing with the plaintiff in consequence of such intimidations, and refused to perform existing contracts and withheld their former customary business, greatly to the plaintiff's damage.

(*d*) The acts last mentioned were not only illegal, rendering the defendants liable in damages, but also misdemeanors at common law as well as by section 168 of the Penal Code of this State.

(*e*) Associations have no more right to inflict injury upon others

than individuals have. All combinations and associations designed to coerce workmen to become members or to interfere with, obstruct, vex or annoy them in working or in obtaining work because they are not members, or in order to induce them to become members, or designed to prevent employers from making a just discrimination in the rate of wages paid to the skillful and to the unskillful, to the diligent and to the lazy, to the efficient and to the inefficient; and all associations designed to interfere with the perfect freedom of employers in the proper management and control of their lawful business or to dictate in any particular the terms upon which their business shall be conducted by means of threats of injury or loss, by interference with their property or traffic, or with their lawful employment of other persons, or designed to abridge any of these rights, are *pro tanto* illegal combinations or associations; and all acts done in furtherance of such intentions by such means and accompanied by damage are actionable.

See Greenhood on Pub. Policy, 648, 653; People v. Fisher, 14 Wend. 9; Tarlton v. McGrawly, Peake, 205; Rafael v. Verelst, 2 W. Black. 1055; Lumley v. Gye, 2 El. & Bl. 216; Bowen v. Hall, 6 Q. B. Div. 333, 337; Gregory v. Duke of Brunswick, 6 M. & G. 205; Gunter v. Astor, 4 J. B. More, 12; Queen v. Rollins, 17 Ad. & El. (N. S.) 671; Mogul Steamship Co. v. Macgregor, 15 Q. B. D. 476; Walker v. Cronin, 107 Mass. 555; Carew v. Rutherford, 106 Mass. 1; State v. Donaldson, 3 Vroom (32 N. J. Law) 151; Master Stevedore's Ass'n v. Walsh, 2 Daly, 1, 13; Johnston Harvester Co. v. Meinhardt, 9 Abb. N. C. 393; S. C. 60 How. Pr. 168; Slaughter House Cases, 16 Wall. 36, 116.

3. There is no such doubt concerning the plaintiff's legal right as should debar it from the usual remedy.[1]

The motion to discharge from arrest is therefore

Denied.

[1] This case is also reported in 18 Abb. N. C. 262, where the complaint and valuable briefs of counsel are given.

LUCKE v. CLOTHING CO.

(77 Md. 306.—1893.)

ROBERTS, J. * * * The appellant's engagement with Rosenfeld Bros. as a "custom cutter" commenced in the month of August, 1891, and continued to the month of February, 1892, and was to continue as long as his work proved satisfactory. His work gave entire satisfaction to his employers, who however retained the right to discharge him at the end of any week; but a member of the firm testified that they would not have discharged him but for the objection of the appellee. The appellee on the 16th of February, 1892, sent Rosenfeld Bros. a written notice, informing them "that in case the nonunion man whom they had in their employ was any longer retained, it would be compelled to notify all labor organizations of the city that their house was a nonunion one."

How many similar organizations there were in the city the record does not disclose, but the membership of the appellee is five hundred. This notice Rosenfeld Bros. construed to mean, that if they retained the appellant in their employ they would lose the patronage of the labor organizations, and that the union labor which they then employed would be ordered out, or they would have to quit work, the effect of which, as testified by Mr. Rosenfeld, would have been to cause his firm great loss, in consequence of their having a number of contracts on hand at that time. There are several inquiries which arise out of the facts just stated. First. Had the appellee justifiable cause in pursuing the course which it did in threatening said firm that if they retained the appellant any longer in their employ it would be compelled to notify all labor organizations of the city that their house was a non-union house? Second. Was the conduct of the appellee in the course pursued by it toward the appellant wrongful or malicious? Third. Had Rosenfeld Bros. reasonable grounds to anticipate loss or injury to themselves in consequence of the action of the appellee?

The first and second propositions can be considered together, as they are somewhat reciprocal in the relation they bear to each other. It is contended on the part of the appellee that it did not, by the sending of the notice of February 16 to Rosenfeld Bros., contemplate any such course as that which has been attributed to it; and that the local law of the appellee and the general law of the order of the

Knights of Labor prohibited the calling out of their members because of the employment of nonunion men. If this be so, how are we to interpret the meaning of the written notice? What purpose did the appellee have in sending it, and what design was, through its agency, sought to be accomplished? This was no idle play in which they were involved. It related to the most serious right affecting a laboring man's life, which was the privilege of seeking remunerative employment, and thereby gaining an honest livelihood. Is it not unquestionably true, that but for the interference of the appellee, the appellant would not have been discharged? It is not necessary that such interference should have been malicious in its character. If it be wrongful, it is equally to be condemned, and just as much in violation of a legal right. In this case we think the interference of the appellee was in law malicious and unquestionably wrongful. The appellant was a man of family, a good workman, engaged in a lawful pursuit, performing his duties in an entirely satisfactory manner, without objection in any respect, and willing and desirous of becoming a member of the appellee if an opportunity had been afforded him. He was not able to obtain membership with the appellee, nor was he permitted to continue his work with his employers, who would gladly have retained him in their service if they could have done so without loss or embarrassment to themselves. Can it then be seriously questioned that from the evidence in this cause the appellee intended or expected any other or different result from the sending of the written notice than that which followed its reception by Rosenfeld Bros.? We are compelled to say that the notice had some meaning and purpose, and if not that which we have suggested, what was it? The testimony in this case assigns no other motive, and there is not the slightest information from any source that there is any. If therefore the appellee sought to bring about the discharge of the appellant under the circumstances detailed in the evidence, if not malicious, it was certainly wrongful, and by so doing it has invaded the legal rights of the appellant, for which an action properly lies.

It is further contended by the appellee that it is only meant by the notice sent Rosenfeld Bros. to say that unless they discharged the appellant it would withdraw the name of the New York Clothing House from the list of houses published in the Critic, which list had annexed to it a statement recommending said houses to the patronage of organized labor. Yet even this view of the letter con-

templated the discharge of the appellant, and necessarily concedes that the sole purpose of the letter was to accomplish the appellant's discharge. In no view of the facts of this case have we been able to ascertain where the appellee derived its right to obtain by the means adopted the discharge of the appellant from his position with Rosenfeld Bros. The provision of law authorizing the creation of the appellee corporation provides for the formation of trades union "to promote the well-being of their everyday life, and for mutual assistance in securing the most favorable conditions for the labor of their members and as beneficial societies." (Code, art. 23, § 37.) But when the State granted its generous sanction to the formation of corporations of the character of the appellee it certainly did not mean that such promotion was to be secured by making war upon the non-union laboring man, or by any illegal interference with his rights and privileges. The powers with which this class of corporations are clothed are of peculiar character, and should be used with prudence, moderation and wisdom, so that labor in its organized form shall not become an instrument of wrong and injustice to those who, in the same avenue of life, and sometimes under less favored circumstances, are striving to provide the means by which they can maintain themselves and their families. It is essential to good government and the peace of society that correct legal principles be applied in the consideration of all questions, for it is undeniably true that wrong principles cannot and never do produce salutary remedies.

The third proposition can be disposed of without extended comment. We think Mr. Rosenfeld, in his testimony, has fairly and intelligently answered this inquiry. His long experience in business, and accurate knowledge of the various methods in vogue for the employment of labor in clothing houses, eminently qualified him to say whether his firm had just cause to apprehend the consequences of a refusal, under the circumstances, to discharge the appellant. Viewed by the light of all the circumstances surrounding the case we are compelled to say that there was reasonable cause to apprehend the result stated by Mr. Rosenfeld in his testimony. "Courts are bound to look at things just as they are, to pass on facts just as they are developed, to treat the conduct of men just as it is, and to impute to them that intention which their acts and their conduct disclose was their intention." U. S. v. Kane, 23 Fed. Rep. 750.

Some criticism was indulged in in the argument of counsel in

this court to the effect that a recovery could not be had in this cause, as the appellant had only declared on a supposed violation of a contract, when in point of fact there had been no contract violated. We concur in this view, and are clearly of opinion that the declaration sets out a cause of action which the proof fails to sustain. The question of a contract *vel non* enters into the consideration of this case, but upon proper averment in the declaration ought to play but small part in its determination. "Where a contract would have been fulfilled but for the false and fraudulent representation of a third person, an action will lie against such person, although the contract could not have been enforced by action." Benton v. Pratt, 2 Wend. 385.

In the case of Harvester Co. v. Meinhardt, 9 Abb. N. C. 396, 397, the court said: "A distinction has been sought to be made between the cases where there has been an unexpired time contract and cases where the services were by the day or by the piece, but I do not think such distinction rests upon any sound reason. * * * In such case the injury to the property and business of the employer would not consist so much in breaking the contract which existed as in the loss of profits derived from the work of the laborer if he continued in the employment, and the probability or certainty of such loss would be, in each case, a question of fact," and of course for the jury.

Mr. Addison, in his work on Torts (fols. 9–14) thus summarizes the law: "Interference by fraud or force with the free exercise of another's trade or occupation or means of livelihood is a tort; such as preventing people, by the use of threats or intimidation, from trading with the plaintiff's vessel in a foreign port, or dealing at the plaintiff's school, or sending their children to the plaintiff's school, or placing obstructions or impediments in the way of free access to the plaintiff's place of business. * * * Where a violent or malicious act is done to a man's occupation, profession or way of getting a livelihood, there an action lies in all cases."

Considerable comment was made at the hearing in this court of the analogy supposed to exist between the case made by the record in this case, and the case of Lumley v. Gye, 2 El. & Bl. 216, but the cases widely differ in important facts, and there is but small analogy in the principles of law properly applicable in each case. The principles of law which are entitled to recognition in this case are too well

settled and determined in a multitude of cases to require numerous citations for their support. The case of Chipley v. Atkinson, 23 Fla. 206, is strikingly like the case now under consideration. The court in that case says: "From the authorities referred to and upon principle, it is apparent that neither the fact that the term of service interrupted is not for a fixed period, nor the fact that there is not a right of action against the person who is induced or influenced to terminate the service or to refuse to perform his agreement, is of itself not a bar to an action against the third person maliciously and wantonly procuring the termination of or a refusal to perform the agreement. It is the legal right of the party to such agreement to terminate or refuse to perform it, and in doing so he violates no right of the other party to it; but so long as the former is willing and ready to perform, it is not the legal right, but is a wrong on the part of the third party, to maliciously and wantonly procure the former to terminate or refuse to perform it. Such wanton and malicious interference for the mere purpose of injuring another is not the exercise of a legal right. Such other person, who is in employment by which he is earning a living, or otherwise enjoying the fruits and advantages of his industry or enterprise or skill, has a right to pursue such employment undisturbed by mere malicious or wanton interference or annoyance. Every one has a perfect right to protect or advance his business if in so doing he infringes no superior legal right of another."

In Bowen v. Hall, 6 Q. B. Div. 338, it was said by BRETT, J. (Lord SELBORNE concurring), that "merely to persuade a person to break his contract may not be wrongful in law or fact; * * * but if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which is in law and fact a wrong act, and therefore a wrongful act, and therefore an actionable act, if injury follows from it." The appellant, by the action of the appellee, lost his place in the month of February, and although persistently in quest of a position, he did not succeed in obtaining work until the following April, when he secured employment with a merchant tailor at $5 less per week than he was receiving when he was discharged. It would be strange indeed if the law under such a state of facts as this record exhibits, provided no remedy. In Winsmore v. Greenbank, Wiles, 581, it is said: "A special action on the case was introduced, for the reason that the law will never suffer an injury

and a damage without a remedy." * * * We are therefore of opinion that upon proper amendment of the declaration there is evidence in the cause legally sufficient to be submitted to a jury.[1]

[1] In Southern Ry. Co. v. Machinists' Local Union (111 Fed. 49, 1901), the court said: "If the picketing, the climbing of the adjacent telephone poles, the climbing upon the fences, the watching of the shops, the assemblies in the streets and at the entrances and the constant and unceasing surveillance had been confined to obtaining information and to unobjectionable social intercourse, for the purpose of begging and entreating not to work, there could be no injunction. But the thrusting themselves upon unwilling "scabs" to "argue"; "persuading," picketing, climbing poles and fences, as an exhibition of force and threats, accompanied by such assaults as have been mentioned; violent, abusive, and threatening messages sent to "scabs" inside, and the like, as shown in this proof,—come clearly within the decisions against such conduct. The character of these acts is conclusively shown by the fact that many, if not all, who left were afraid, and by the fact that those who remain and are at work feel the necessity of keeping inside the plaintiff's yards, lodging and eating there in places provided for them by the plaintiff. In fact, they are besieged, and act wisely to keep inside, in view of what has been done and may yet be done if not enjoined. The proof convinces me of this. These defendants and other strikers similarly situated, in effect and by their conduct, have assumed that "scabbing" is as much an offense against municipal and social law as it is against the law of their labor unions, and therefore that all nonunion laborers are bound by their law, and may be made to respect it. Not being able to use the ordinary processes of the law of the land to enforce obedience to their strike law, they proceed to use such other force as they may command, it being such as they used in this case. It only requires a moment's reflection to see that this is an unjustifiable assumption, and imposes upon nonunion laborers and all employers of labor, and indeed upon all other people, the most detestable of all tyrannies,—laws made without representation in the law-making body. The assumption and insistence on obedience to it are of themselves unlawful whenever the insistence takes the form of compulsion, be the force used what it may. * * * *

The labor unions have gained the victory in the struggle which denied their own freedom to combine together to quit work collectively, and use such peaceable means as the law allows to promote their strikes. It took an act of parliament in England to enlarge this right against the common-law prohibitions of conspiracy and combinations to incite others to quit work. But our courts in America generally have yielded the enlarged right without a statute. So much gained for the sake of personal liberty by the strikers should induce them to yield the same rights of liberty to the "scabs"—a word I use because it is the technical word of the labor unions and the strikers—and their employers. The strikers cannot have, under the law of equal rights, a liberty of contracting as they please, working when they please, and quitting when they please, which does not belong alike to the "scabs" and their employers. And it is this right the courts of equity enforce by injunction. The supreme court of the United States has established that as the law of this case."

WEBB v. DRAKE.

(53 La. Ann. 290; 26 So. 791.—1899.)

MONROE, J. * * * * Upon the basis of this evidence and of the surrounding circumstances, we are forced to the conclusion that Miller, Drake, and Thomas Crichton were intensely exasperated against the plaintiff, and determined to retaliate in kind for what they conceived to be injuries received at his hands, consisting, as it appears, of what they considered overassessments of property in which they were interested, and proceedings against them for failing to make returns. The evidence shows that they were among the most influential business men in Minden. As merchants, the two Crichtons (each having a separate store) and Drayton are said to do more business than all the other merchants in the town combined, and they buy largely through drummers. In addition to this, they are presidents and stockholders of and in various business corporations. Miller, also, is a man of position and influence; being cashier of, and stockholder in, the only bank in the place. We think that the evidence justifies the conclusion that they determined, as a measure of retaliation, to use their influence to destroy the business of Webb's hotel by withdrawing from it the drummer patronage upon which it relied. Whether they entered into a formal or an informal, a written or an unwritten, agreement or contract to that effect, is wholly immaterial. That the matter was discussed between them is beyond all question, and each acted with knowledge that the other was acting upon the same lines, and for the accomplishment of the same purpose.

The fact that they were inimical to the plaintiff, and would not favor, in a business way, those who patronized his hotel, was made so widely known that drummers approaching the town were informed of it before reaching there; and the information appears to have reached them in such a way as to suggest that the boycott was participated in, not only by those who originated it, but by all the merchants in the place. Smith, one of the drummers, testifying for himself, says, in substance, that in visiting Minden he was not looking to the hotel for patronage, but to the merchants, and that, as the hotel keeper antagonized his friends and patrons, he withdrew his patronage from the hotel. And through Smith, it may safely be

said, we hear the testimony of every drummer on the road. Their business in Minden was to sell goods, and when those to whom only they could make sales gave it to be understood, and made it a matter of public notoriety, that they would not buy from persons patronizing a particular hotel, they may have felt some curiosity, as Chapman expressed it, to know why it was; but beyond that the affair did not concern them, nor were they likely to take any chances. They simply ceased to patronize the objectionable hotel, and preserved their trade.

The boycott was declared during the last days of February or the first days of March. The business of the hotel almost entirely ceased, and the plaintiff closed it for business purposes about March 25th. It has been suggested that he closed up under the advice of counsel, in order to put himself in a position to bring a speculative damage suit. We are not so impressed by the evidence. Upon the contrary, it appears to us that it would have been utterly useless, under the circumstances, for him to have attempted to continue in business. So long as the defendants maintained the attitude which they had assumed, he could have done no business which would have justified his keeping the hotel open; and he could not have been expected, even had his finances permitted, to await their pleasure or mercy. The good will of the business was for the time destroyed and the plaintiff had no power to revive it. It rested entirely with the defendants to say when or whether that tendency of the drummers to patronize the hotel, which constituted that good will, should be unfettered of the shackles which they had placed upon it, and in the meanwhile the plaintiff might starve. For him to have temporized would therefore have been, to say the least, unwise. Hence he accepted the situation, and closed up his house. He appears thereafter to have endeavored to rent it, but, as he wished to make some arrangement to board (with his family) with the lessee, he found some difficulty in doing so.

Eventually, however, at the expiration of about 10 months, he found a tenant in the person of the bookkeeper of one of the defendants, who, as we understand it, carries on the business through a young gentleman who is a clerk in the same establishment. The furniture is not included in this lease, but has been disposed of,—some of it sold at a sacrifice, and some of it stored. The business thus destroyed afforded the plaintiff a living for himself, wife, and two children. He kept no books, and testifies in a general way that

they made $50 or $60 per month after paying expenses, and that his expenses were $300 per month. In order to sustain these estimates, he must have had an average of six guests per day, at $2 each, which was the charge for transient guests. The witnesses all concur that he was doing a good business,—speaking, of course, in relative terms,—and the weight of the evidence justifies the belief that he had two-thirds of the drummer patronage. We think, however, that six guests per day would be a high average, and that the plaintiff's estimates of his receipts and expenditures are somewhat large. The property itself is not shown to have depreciated in value, and is rented for about 10 per cent. of its cost. Plaintiff testifies that he has sold about half of his furniture, the whole of which cost him $1,500, at a loss of some 50 per cent. upon the cost price. The question, then, is as to the quantum of damages. The claim, as made, is divided into two elements,—destruction of business, with loss of profits, distress, and annoyance and injury to character, to which is added a demand for the infliction of punitory damages. We should find some difficulty in dealing with the question of injury to character, for the reason that testimony offered on behalf of the defendants as to the estimation in which plaintiff is held in the community in which he lives, offered in mitigation, was excluded in the lower court; but as we believe that it will rather conduce to the ends of justice to dispose of the case as we have it, than to remand it, this element of damage may be regarded as eliminated. Loss of profits is conjectural and uncertain, but the good will of an established business has usually a market value, and is frequently the subject of barter and sale. The plaintiff has shown actual loss, in the sale and storage of his furniture, and in the distress and mortification consequent upon the position in which he has been placed. A settlement and a home, apparently for life, have been broken up. These elements of plainly-established injury we think warrant judgment for $ 1,500.

Competition can be no defense here since def. & plff are not in the same business.

§ 7E.—INDUCING BREACH OF CONTRACT.

BOYSON v. THORN.

(98 Cal. 578.—1893.)

HAYNES, C. Defendant demurred to plaintiff's complaint, the demurrer was sustained, and judgment was thereupon rendered dismissing the action, from which judgment the plaintiff appeals.

The complaint alleges that Frank G. Newlands is the owner and in possession and control of the Palace Hotel in the City of San Francisco, and of a public restaurant attached thereto, and conducted the same as a hotel and restaurant, and that the defendant during all the times mentioned in the complaint was the agent of Newlands, and as such had charge of the business thereof and direction of the servants therein; that immediately prior to November 1, 1889, Newlands entered into an agreement whereby plaintiff hired certain rooms in said hotel, as lodgings for himself and wife from November 1, 1889, at the monthly rent of one hundred dollars; that they were to have their meals at said restaurant or furnished from said restaurant to their said rooms, he paying therefor the usual rates; that they entered and occupied the rooms, and in all things complied with said agreement, but that on December 5, 1889, the "defendant maliciously and with intent to oppress, annoy, and disturb plaintiff in the occupancy of his lodgings, and to force him to abandon the same, and to deprive him of the comforts and conveniences which he was then and there enjoying, and to injure him in his profession, and to degrade him and belittle him in the eyes of the guests of said hotel and of his friends and of the public in general, and in fraud of said agreement, caused and procured F. G. Newlands then and there to demand that plaintiff and his wife forthwith vacate said lodgings." It is further charged that defendant maliciously caused and procured Newlands to refuse to furnish meals, etc.; and to instruct the servants to refuse their orders; and that on December 12, 1889, defendant maliciously caused and procured Newlands to threaten and attempt to forcibly eject plaintiff and his wife from said rooms, whereby his wife became ill, and he was compelled to and did employ a nurse at an expense of sixty dollars, and also to hire men to protect his wife and retain posses-

sion, etc., at a further expense of sixty dollars, and prays for twenty-five thousand one hundred and twenty dollars damages.

The action is against Thorn alone. The demurrer is that the facts stated do not constitute a cause of action against the defendant.

The broad question presented is whether an action will lie against one who, from malicious motives, but without threats, violence, fraud, falsehood, deception, or benefit to himself, induces another to violate his contract with the plaintiff. We state the question thus because it will be observed that the complaint does not state the means used to cause or procure Newlands to violate his contract with the plaintiff, but only that it was done "maliciously."

The general rule is that only those that are parties to, or in some manner bound by a contract, are liable for a breach of it. To this general rule there are certain exceptions as, for example, contracts for personal services involving the relation of master and servant; and there are also other cases that are sometimes classed as exceptions, but which are not strictly so.

In Cooley on Torts, 2d ed., p. 581, it is said: "An action cannot, in general, be maintained for inducing a third person to break his contract with the plaintiff, the consequence after all being only a broken contract, for which the party to the contract may have his remedy by suing upon it. But if the third person was induced to break his contract by deception, it may be different. If, for example, one were to personate a vendee of goods, and receive and pay for them as on a sale to himself, the vendee would have his action against the vendor; but he might also pursue the party who by deceiving one had defrauded both." In the case supposed by the learned author, the gist of the action is the fraud of the defendant in personating the vendee. The fact that the only injury or damage sustained by the vendee in consequence of defendant's fraud was the loss of the benefit he would have derived from the performance of the contract, does not at all change the character of the action. Suppose that A, knowing that B is about to bestow upon C, as a gratuity, a large amount of money or property, fraudulently personates C, and receives the money or property, C could have no action against B, for there was no contract relation between them; but C could have his action against A for the loss caused by his fraud. The means used to accomplish the wrong is in each case the same, showing conclusively that the fraud is the basis of the

action, while the breach of the contract thus procured goes only to the question of damages; that is, how and in what manner and to what extent has the plaintiff been injured by the fraud, deceit, or other wrongful act of the defendant.

Rice v. Manley, 66 N. Y. 82; 23 Am. Rep. 30, cited by appellant, is another illustration. There the plaintiff had contracted verbally with Stebbins for the purchase of a large quantity of cheese. The defendant Manley procured a telegram to be sent to Stebbins in the name of E. Rice, falsely saying that plaintiffs did not want the cheese, and thereby induced Stebbins, who supposed E. Rice was one of the plaintiffs, to sell the cheese to Manley. Stebbins was not bound by the verbal contract, but it is found that he would have performed it but for the fraud of defendant. The action was sustained.

Benton v. Pratt, 2 Wend. 385; 20 Am. Rec. 623, also cited by appellant, was another case where a contract with the plaintiff was broken because of defendant's false representation that plaintiff had abandoned all intention of fulfilling it.

Lally v. Cantwell, 30 Mo. App. 524, also cited by appellant, was an action for loss of employment. The court, after discussing the cases involving the relation of master and servant, said: "But this case falls within another well-settled principle, which is that where the interference takes the form of false, defamatory statements—of libel or slander—an action will lie for interference with a relation beneficial to the plaintiff, although the relation did not rest in contract, and although the breach of it by the party who was procured to break it was not actionable."

The cases are too numerous to be cited or reviewed where interference with business or contract relations, through acts of violence, nuisance, threats, deceit, fraud, libel, or slander, have been redressed, both in England and in this country. Most of the cases cited by appellant which do not involve the relation of master and servant, will be found of the character above mentioned, though in many of both classes will be found expressions which more or less directly support the proposition for which appellant contends.

Cases involving the relation of master and servant, though that relation is now created solely by contract, seem to stand upon different grounds from contracts not involving that relation. Section 49 of the Civil Code, entitled "Protection to Personal Relations," is as follows: "The rights of personal relation forbid: 1. The ab-

duction of a husband from his wife, or of a parent from his child. 2. The abduction of a wife from her husband, or of a child from a parent or guardian entitled to its custody, or of a servant from his master. 3. The seduction of a wife, daughter, orphan sister, or servant. 4. Any injury to a servant which affects his ability to serve his master."

In this state, at least, no analogy favorable to appellant can be drawn from cases involving what the code itself declares to be "a personal relation" existing between master and servant. The code does not distinguish between different means which may be employed to disturb or destroy any of these relations, for it is the direct interference with the relation which is forbidden, whether the relation be founded in natural right, as parent and child, or created by law, as guardian and ward, or by personal contract, as between master and servant, and therefore does not depend upon the mode or means in or by which the relation may be created. It is not the mere procuring of one party to a contract to break his contract, but it is the taking away from or depriving the master of the subject of the contract, or that which the master contracted for, viz: the services of the servant.

The facts alleged in the complaint do not bring the case within the principle governing cases involving the relation of master and servant, nor of those cases where a contract is procured to be broken by fraud, deceit, slander, or other actionable wrong, as in Rice v. Manley, and other cases above noted. It is conceded by appellant, and it is unquestionably true, that "one may advise a friend in all honesty, and without ill-will to the other contracting party, to abide the risks of breaking an onerous or mischievous contract, rather than those of performing it." In Bowen v. Hall, Law R. 6 Q. B. D. 338, BRETT, L. J., said: "Merely to persuade a person to break his contract may not be wrongful in law or fact." This being true, will the fact that the advice or persuasion proceeds from malicious motives create a liability where the same advice or persuasion, if given from good motives, would not?

In considering this question, the distinction between civil and criminal proceedings must not be overlooked. In the dissenting opinion of Lord COLERIDGE, C. J., in Bowen v. Hall, Law R. 6 Q. B. D. 343, the question above presented is answered thus: "It is, I believe, also admitted, except by Sir William Erle, whom I think no one has ever followed, that if a man endeavors to persuade

another to break his contract and succeeds in his endeavor, yet if he does this without what the law calls 'malice,' the damage which results, however great, is not in itself a cause of action, I mean, of course, a cause of action against him; but if the damage which is not in itself actionable, be joined to a motive which is not in itself actionable, the two together form a cause of action. This seems a strange conclusion. * * * I do not know, except in the case of Lumley v. Gye, 2 El. & B. 216, that it has ever been held that the same person for doing the same thing under the same circumstances, with the same result, is actionable or not actionable according to whether his inward motive was selfish or unselfish for what he did. I think the inquiries to which this view of the law would lead are dangerous and inexpedient inquiries for courts of justice; judges are not very fit for them, and juries are very unfit."

It is a truism of the law that an act which does not amount to a legal injury cannot be actionable because it is done with a bad intent; that what one has a right to do another cannot complain of. It is conceded that one may lawfully persuade or procure another to break his contract with a third person, "if it be done from good motives." We think the qualification has no place in the proposition. If it is right, and the means used to procure the breach are right, the motive cannot make it a wrong any more than a good motive would justify fraud, deceit, slander or violence to effect the same purpose. Suppose A, by fraudulent representations, induces B to sell him a large quantity of goods on credit, intending to defraud B of the entire value of the goods; C, knowing that the representations are false, and not caring whether B shall lose his goods or not, but of unmixed malice and ill-will toward A, procures B to refuse to deliver the goods by truthfully informing B of the falsity of the representations made by A, will it be said that C is liable in an action brought by A? In Cooley on Torts, 2d ed., p. 832, the learned author says: "Bad motive by itself, then, is no tort. Malicious motives make a bad act worse, but they cannot make that a wrong which in its own essence is lawful. When in legal pleadings the defendant is charged with having wrongfully done the act complained of, the words are only words of vituperation, and amount to nothing unless a cause of action is otherwise alleged." Again the same author, at page 836, says: "Motive generally becomes important only when the damages for a wrong are to be estimated.

It then comes in as an element of mitigation or aggravation, and is of the highest importance."

That the mere fact that one induces another to break a contract with a third person does not give a right of action, seems to have been directly decided in McCame v. Wolff, 28 Mo. App. 447, cited by appellant. The petition alleged that "by some means unknown to plaintiff" the defendant induced a third person to recede from a contract whereby the plaintiff lost commissions. The court said: "the demurrer was properly sustained. The petition charges neither malice nor fraud on defendant's part, and in the absence of both an action of this kind is not maintainable."

Lumley v. Gye, 2 El. & B. 216; Bowen v. Hall, Law R. 6 Q. B. D. 333, and Walter v. Cronin, 107 Mass. 555, are cited and largely relied upon by appellant. In Lumley v. Gye, plaintiff, the proprietor of a theater, employed Miss Wagner to sing in his theater for a specified time. Defendant, knowing the premises, and maliciously intending to injure the plaintiff, enticed and procured Wagner to refuse to perform, by means of which enticement and procurement she wrongfully refused to perform, etc. Defendant demurred to the declaration. The court held that the relation of master and servant existed, and the decision was placed upon that ground; CROMPTON, J., saying, however, that he did not wish to be considered as deciding "or as saying that in no case except that of master and servant is an action maintainable for maliciously inducing another to break a contract, to the injury of the person with whom such contract has been made." Mr. Justice COLERIDGE (now Lord Chief Justice of England) dissented in a long and able opinion, holding that the relation of master and servant did not exist within the intent of the statute of laborers of 23 Edw. 3, in which he said the law in relation to the seduction of servants had its origin; and as to the broader proposition argued by counsel and referred to by CROMPTON, J., concluded: "Merely to induce or procure a free contracting party to break his covenant, whether done maliciously or not, to the damage of another, for the reasons I have stated, is not actionable."

In Bowen v. Hall, Law R. 6 Q. B. D. 333, a contract for skilled labor, the case was decided in the appellate court upon the authority of Lumley v. Gye, Lord COLERIDGE again dissenting. The opinions of the majority of the court go far to sustain the broad proposition contended for by the appellant here. Lumley v. Gye was declared

by Lord COLERIDGE, in the latter case, to stand alone. The reasoning in the dissenting opinions in those cases seems conclusive and satisfactory.

Walker v. Cronin, 107 Mass. 555, was also a case of enticement of laborers. The question arose upon demurrer. The court held, after stating the declaration: "This sets forth sufficiently. 1. Intentional and willful acts. 2. Calculated to cause damage to the plaintiffs in their lawful business. 3. Done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendant; which constitutes malice; and 4. Actual damage and loss resulting." This case does not seem to be based upon the relation of master and servant, or that of a contract for personal services, but unless it can be sustained upon that ground (a point not necessary to consider) the decision is clearly wrong.

In Payne v. Railroad Co., 13 Lea, 507; 49 Am. Rep. 666, plaintiff, a merchant, had a large and profitable trade with defendant's employees. Defendant circulated a notice to the effect that any of its employees who, after that date, traded with plaintiff, would be discharged. This, is is alleged, was done maliciously, whereby plaintiff was damaged. The court held that an act not unlawful, done in a manner not unlawful, though from wicked and malicious motives, and causing injury, is not actionable. That no contract existed between the merchant and the employees does not affect the principle involved. 2. Greenleaf on Evidence, section 453, defines a malicious act: "In a legal sense, any unlawful act, done willfully and purposely to the injury of another is, as against that person, malicious."

Two cases recently decided by the Supreme Court of Kentucky fully sustain our conclusion. Boulier v. Macauley, 15 S. W. Rep. 60, was a stronger case than Lumley v. Gye, as the dramatic performer was not only induced to violate her agreement with plaintiff, but to perform in defendant's theater instead. It was held that defendant was not liable. The other case, Chambers v. Baldwin, 15 S. W. Rep. 57, was for procuring a third party to break his contract for the sale of a crop of tobacco. The complaint was demurred to. The questions presented, as stated by the court, are: "1. Whether one party to a contract can maintain an action against a person who has maliciously advised and procured the other party to break it. 2. Whether an act lawful in itself can become action-

able solely because it was done maliciously." The judgment of the court below sustaining the demurrer was affirmed.

Jones v. Stanly, 76 N. C. 355, cited by appellant, directly sustains appellant's contention, but the decision is based upon Haskins v. Royster, 70 N. C. 601, 16 Am. Rep. 780, (the only case cited,) which case involved the relation of master and servant, and was decided by a divided court.

It may be questioned whether the omission to allege that Thorn knew of the contract between appellant and Newlands is not fatal to the complaint, but, as we conclude that the demurrer was properly sustained upon the principal point made, it is not necessary to consider it.

We are of the opinion that the judgment appealed from should be affirmed.[1]

LONDON GUARANTEE & ACCIDENT CO. v. HORN.

(206 Ill. 493; 69 N. E. 526.—1903.)

SCOTT, J. As we understand the records in this case, appellee (Horn) was in the employ of Arnold, Schwinn & Co., a corporation, under a contract terminable by either party at any time, but under which the employment would have continued for an indefinite period, had appellant not caused Arnold, Schwinn & Co. to discharge appellee, for the purpose of compelling appellee to surrender and release a cause of action which he claimed, and for the

[1] In Ashley v. Dixon, 48 N. Y. 430 (1872), the court said: "If A. has agreed to sell property to B., C. may at any time before the title has passed, induce A. not to let B. have the property and to sell it to himself, provided he be guilty of no fraud or misrepresentation, without incurring any liability to B.; A. alone, in such case, must respond to B. for the breach of his contract, and B. has no claim upon or relations with C. While, by the moral law, C. is under obligation to abstain from any interference with the contract between A. and B., yet it is one of those imperfect obligations which the law, as administered in our courts, does not undertake to enforce. But if C. makes use of any fraudulent misrepresentations as to B., to induce A. to violate his contract with him, then there is a fraud, accompanied with damages, which gives B. a cause of action against C.; as if C. fraudulently represents to A. that B. had failed or absconded, or had declared his intention not to sell to B., and thus induces A. to sell to another. Here there is no proof of any fraudulent representations made by defendant to induce Patrick to violate his contract with the plaintiffs."

satisfaction of which, if it existed, appellant was liable up to the amount of $5,000, and as a result of which discharge appellee was without employment for several considerable periods, and sustained financial loss and injury consequent upon such discharge.

Under these circumstances, does a cause of action exist in favor of appellee and against appellant? The result of this suit depends upon the answer to this question.

We have been favored with most elaborate and exhaustive briefs by counsel for both parties. The case principally relied upon by counsel for appellant is that of Allen v. Flood, (1898) A. C. 1, 67 L. J. Q. B. 119, decided by the House of Lords in 1897. This case has excited a wide discussion, and was considered at length by this court in Doremus v. Hennessy, 176 Ill. 608, 52 N. E. 924, 54 N. E. 524, 43 L. R. A. 797, 802, 68 Am. St. Rep. 203. In this English case certain boiler makers, members of a trade union, in common employment with the plaintiffs, who were shipwrights, members of a rival organization, working on wood, objected to working with the latter on the ground that in a previous employment they had been engaged on iron-work, it being contrary to the regulations of the union to which the boiler makers belonged for shipwrights to do work of that character. Allen, as a representative of the boiler makers, saw the manager of their employer, to whom he stated that if the shipwrights, who were engaged from day to day, were not dismissed, the boiler makers would leave their work or be called out by their union. The shipwrights were thereupon discharged, and brought an action against Allen. Their right to recover was denied, principally upon the ground that every workman has a right to exercise his own option with regard to the persons in whose society he will agree or continue to work, and that when the employer was confronted with a situation where he would lose the services either of the boiler makers or the shipwrights he had the right to elect which class of workmen to discharge, and, electing to discharge the shipwrights, both he and the boiler makers were within their legal rights, and no cause of action arose.

In Mogul Steamship Co. v. McGregor, 21 Q. B. D. 544, the plaintiffs and defendants were rival shipowners. The defendants offered certain inducements to secure the shipping of freight from those who might otherwise have patronized the plaintiffs. The right of action was denied, on the ground that the situation was the result of lawful competition between the parties.

Huttly v. Simmons, 67 Q. B. D. 213, is a case where the plaintiff was a cab driver, and the defendants were members of a cab drivers' trade union. All parties to the suit were engaged in business in the same city. The defendants induced a cab proprietor to refuse to engage the plaintiff to drive a cab for him or to let a cab to the plaintiff to be driven by him. It will be observed that in this case the plaintiff in his employ would come in competition with the union to which the defendants belonged, and in holding that no cause of action existed it was said that none of the acts done or agreed to be done gave the plaintiff any right of action for injury, in law, to any legal right of his; following the case of Allen v. Flood, *supra.*

In Quinn v. Leathem, App. Cas. of 1901, p. 495 (decided by the House of Lords), Lord MACNAGHTEN, in speaking of Allen v. Flood, stated that its headnote might well have run in these words: "An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent;" and in this case, last referred to, it is said that "it is a violation of legal right to interfere with contractual relations recognized by law, if there be no sufficient justification for the interference."

We are of opinion that the contention of appellant in the case at bar, to the effect that competition in trade, employment, or business is such a justification, is in accord with the authorities. This view finds support in the case of Chambers v. Baldwin (Ky.) 15 S. W. 57, 11 L. R. A. 545, 34 Am. St. Rep. 165, where it was held that a party to a contract for the sale of goods cannot maintain an action against one who maliciously, and with design to injure him and to benefit himself by becoming a purchaser in his stead, advises and procures the other party to break the contract.

In Raycroft v. Tayntor, 68 Vt. 219, 35 Atl. 53, 33 L. R. A. 225, 54 Am. St. Rep. 882, the superintendent of a stone quarry had given one Libersont leave to go upon the quarry and cut some of the poorer granite. Libersont employed the plaintiff to assist in this work. Defendant had a right to terminate Libersont's license at any time, and Libersont's employment of plaintiff could be terminated by either of the parties thereto at any time. The defendant had a personal difficulty with the plaintiff, and thereupon induced Libersont to discharge him, threatening if Libersont did not do so he (the defendant) would revoke the leave which Libersont had to take granite. The court holds that no right of action existed, put-

ting the conclusion on the ground that the defendant had the undisputed right to determine who might remain and work upon the quarry, and that he could have revoked Libersont's license for the express purpose of removing the plaintiff, and, that being true, he could also lawfully require Libersont to discharge the plaintiff or leave the quarry; but it is said that "the authorities cited for the plaintiff clearly establish that if the defendant, without having any lawful right, or by an act or threat aliunde the exercise of a lawful right, had broken up the contract relation existing between the plaintiff and Libersont, maliciously or unlawfully, although such relation could be terminated at the pleasure of either, and damage had thereby been occasioned, the party damaged could have maintained an action against the defendant therefor." The decision plainly proceeds upon the theory that the defendant had a right superior to the right of Libersont to determine who should be employed at the quarry in question.

In our judgment the cases cited by appellant, in so far as they lend support to its theory, will be found to be cases where the party who secured the discharge of the employee was in some way in competition with that employee in the business or work in which the employee was then engaged, or was a member of some organization which was in competition with the employee or some organization to which that employee belonged, and the fact that such competition existed has been treated by some of the courts as justification for the act of the defendant in bringing about the discharge. In fact, appellant seems to take this view, for it devotes a considerable portion of its argument to an attempt to show that plaintiff and defendant were in competition with each other, in that appellant desired to secure or satisfy the alleged right of action of appellee for the least possible sum, while appellee desired to secure for that right of action the greatest possible sum.

Counsel seem to have been impelled to this view of the matter by the dissenting opinion of Mr. Justice HOLMES in Vegelahn v. Guntner, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443, where, in discussing the proposition that one man may set up a business in competition with another with the intention and expectation of ruining another already engaged in that business in that locality, and if he succeed in his intent is not held to act unlawfully and without justifiable cause, Justice HOLMES used this language: "If the policy on which our law is founded is too nar-

rowly expressed in the term 'free competition,' we may substitute 'free struggle for life.' Certainly the policy [that of permitting free competition] is not limited to struggles between persons of the same class competing for the same end. It applies to all conflicts of temporal interests."

While it is true that the temporal interests of Horn and appellant were involved in the negotiations between them, we believe that the authorities which look upon competition as a justification for the act of one party in securing the discharge of an employee have regarded the term in a more restricted sense, and given to the term "competition" its ordinary meaning and signification. This conclusion is certainly warranted by the reasoning in Doremus v. Hennessy, *supra,* where this court discusses competition as a defense to an action of this character. It cannot be held that appellee and appellant were, in any ordinary sense of the term, in competition with each other. It is also to be observed that the injury which it was sought to visit upon Horn was not primarily to subject him to a deprivation of his employment, but was to compel him to surrender a right not connected with his employment. If the only object of appellant had been to secure appellee's discharge for the purpose of obtaining his position for another, or for the reason that the employment of appellee by Arnold, Schwinn & Co. in some way conflicted with the right of appellant, or some organization to which it belonged, to obtain the same or similar employment, a very different question, and one not now before this court, would be presented, and Allen v. Flood, *supra,* and other cases of that character cited by appellant, would then be worthy of greater consideration.

It is further contended on the part of the appellant that while the evidence may have shown that it was animated by "malice," in the ordinary acceptation of the term, toward Horn, the proof fails to show any legal malice. In this connection it is argued that appellant had the right to have Horn discharged under the terms of the contract, or, if it did not have that right, that it seriously and in good faith believed that it had, and that it is thereby relieved of any imputation of malice. There is no provision in the policy which by the wildest stretch of the imagination could be held to give any such right to appellant; and its conduct in attempting to secure a settlement of this claim shows it to have been animated by a wanton disregard of the rights of appellee. He was first told by the attorney of appellant that unless he settled for a trifling amount appellant

would have him discharged by Arnold, Schwinn & Co.—a threat to do that which this attorney must have known his client had no right to do. Afterward, Robinett, the agent for the company, made the same threat, and, upon his attention being called to the fact that the policy gave him no power to require Horn's discharge, he said to Arnold, Schwinn & Co.: "If you don't discharge him I will have to cancel this policy to-day. I am here to bring this case to a focus to-day, and if you refuse to lay him off I will cancel it." When Mr. Robinett made this threat, which resulted in appellee's discharge, he was making a threat to do an unlawful thing—to do a thing which appellant, by the terms of the contract, had no right to do. The contract provided only for its cancellation upon five days' notice. It is not pretended that any such notice had been given, but Robinett secured Horn's discharge by threatening to cancel the contract "to-day." We think it perfectly apparent that the attorney for appellant, and its agent, Robinett, each sought to bring about, and finally did bring about, the discharge of appellee by threatening to do acts which each, respectively, knew he had no right to do.

"Malice," in its legal sense, means a wrongful act done intentionally, without just cause or excuse; the willful violation of a known right. 19 Am. & Eng. Ency. of Law (2d Ed.) p. 623. Were the acts of appellant wrongful?

In Moran v. Dunphy, 177 Mass. 485, 59 N. E. 125, 52 L. R. A. 115, 83 Am. St. Rep. 289, it is said: "We apprehend that there no longer is any difficulty in recognizing that a right to be protected from malicious interference may be incident to a right arising out of a contract, although a contract, so far as performance is concerned, imposes a duty only on the promisor. Again, in the case of a contract of employment, even when the employment is at will, the fact that the employer is free from liability for discharging the plaintiff does not carry with it immunity to the defendant, who has controlled the employer's action to the plaintiff's harm."

In Hollenbeck v. Ristine, 114 Iowa, 358, 86 N. W. 377;[1] it is stated that the contention of appellant "is bottomed on the thought that he did not act unlawfully in inducing Mr. Hall to discharge the plaintiff, and therefore no action will lie." This position is said to be incorrect, and it is held to be unlawful to induce another to discharge an employee without just cause.

[1] This was an action for libel.

In Quinn v. Leathem, *supra,* it was said: "It is a violation of legal right to interfere with contractual relations recognized by law if there be no sufficient justification for the interference." This gives rise to the question, what is sufficient justification? As we have already seen, the ends of competition have been deemed sufficient. No doubt the fact that the employee was inefficient, untrustworthy, dishonest, or dissolute would be deemed a legal justification, but certainly a desire to compel the employee to surrender a cause of action wholly disconnected with the continuance of his employment does not afford justification for interference by a third party, who desires the satisfaction of the alleged liability. "If the persuasion be used for the indirect purpose of injuring the plaintiff or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act if injury ensues from it." Bowen v. Hall, 6 Q. B. D. 333. The right to maintain an action can be sustained upon the doctrine that a man who induces one of two parties to a contract to break it, intending thereby to injure the other or to obtain a benefit for himself, does the other an actionable wrong. Gore v. Condon (Md.) 39 Atl. 1042, 40 L. R. A. 382, 67 Am. St. Rep. 352. It follows, therefore, that the act of the defendant complained of was wrongful, and, in the legal sense of the term, malicious.

Arnold, Schwinn & Co. had the undoubted right to discharge Horn whenever it desired. It could discharge him for reasons the most whimsical or malicious, or for no reason at all, and no cause of action in his favor would be thereby created; but it by no means follows that while the relations between Arnold, Schwinn & Co. and Horn were pleasant, and while, as the evidence shows, it was the expectation of the company that Horn would continue in its employ "all the year around," that the interference of appellant, whereby it secured the employer to exercise a right which was given it by the law, but which, except for the action of appellant, it would not have exercised, is not actionable. In Perkins v. Pendleton, 90 Me. 166, 38 Atl. 96, 60 Am. St. Rep. 252, the conclusion of the court is "that wherever a person, by means of fraud or intimidation, procures either the breach of a contract or the discharge of a plaintiff from an employment which, but for such wrongful interference, would have continued, he is liable in damages for such injuries as naturally result therefrom; and that the rule is the same whether

by these wrongful means a contract of employment definite as to time is broken, or an employer is induced, solely by reason of such procurement to discharge an employee whom he would otherwise have retained." In Chipley v. Atkinson, 23 Fla. 206, 1 South. 934, 11 Am. St. Rep. 367, it is said: "From the authorities referred to in the last preceding paragraph, and upon principle, it is apparent that neither the fact that the term of service interrupted is not for a fixed period, nor the fact that there is not a right of action against the person who is induced or influenced to terminate the service or to refuse to perform his agreement, is of itself a bar to an action against the third person maliciously and wantonly procuring the termination of or a refusal to perform the agreement. It is the legal right of the party to such agreement to terminate it or refuse to perform it, and in doing so he violates no right of the other party to it, but, so long as the former is willing and ready to perform, it is not the legal right, but is a wrong on the part of a third party to maliciously and wantonly procure the former to terminate or refuse to perform it."

This question has frequently been before courts of last resort in this country. The view taken in the two cases last cited finds support in the following authorities: Moran v. Dunphy, *supra;* Curran v. Galen, 152 N. Y. 33, 46 N. E. 297, 37 L. R. A. 802, 57 Am. St. Rep. 496; Raycroft v. Tayntor, *supra;* Lucke v. Clothing Cutters, 77 Md. 396, 26 Atl. 505, 19 L. R. A. 408, 39 Am. St. Rep. 421; Hollenbeck v. Ristine, *supra;* and also in Blumenthal v. Shaw, 77 Fed. 954, 23 C. C. A. 590, decided by the Third Circuit Court of Appeals. In our own state the case of Doremus v. Hennessy is first reported in 62 Ill. App. 391. Plaintiff there kept a laundry office, where she received clothing which her patrons desired to have laundered. She would then procure persons operating laundries to do the work and return the garments to her for delivery to her customers. The defendants were members of the Chicago Laundrymen's Association. She charged, by her declaration, that the defendants, by false representations and by threats and intimidation, induced certain parties who had been doing the work for her to break their contracts and engagements with her. The Appellate Court, after stating that it is now well established that in civil actions the conspiracy is not the gravamen of the charge, but may be pleaded and proved in aggravation of the wrong, declares the law to be that an action may be maintained for the malicious

interference with the business of another, his occupation, profession, or way of obtaining a livelihood, and affirmed a judgment of $6,000 in favor of the plaintiff. The case came to this court, where it is reported in 176 Ill. 608, 52 N. E. 924, 54 N. E. 524, 43 L. R. A. 797, 802, 68 A. St. Rep. 203. The judgment of the Appellate Court was affirmed, and it appears from the statement of facts made by this court that with some of the persons who did work for her the arrangement was that they would do her work as long as the laundry association did not interefere, and that these persons, among others with whom she had contracts for specific periods, were induced, by threats made by the laundry association, to cease connection in business with appellee. Appellants contended that their acts were not mere malicious acts, done solely with the intent to injure plaintiff's business, but were in the line of legitimate competition. It was there said by this court (page 614, 176, Ill., and page 925, 52 N. E., 43 L. R. A. 797, 802, 68 Am. St. Rep. 203): "No persons, individually or by combination, have the right to directly or indirectly interfere or disturb another in his lawful business or occupation, or to threaten to do so, for the sake of compelling him to do some act which in his judgment his own interest does not require. Losses willfully caused by another, from motives of malice, to one who seeks to exercise and enjoy the fruits and advantages of his own enterprise, industry, skill, and credit, will sustain an action. It is clear that it is unlawful and actionable for one man, from unlawful motives, to interfere with another's trade by fraud or misrepresentation, or by molesting his customers or those who would be customers, or by preventing others from working for him or causing them to leave his employ by fraud or misrepresentation or physical or moral intimidation or persuasion, with an intent to inflict an injury which causes loss."

It is true that in the additional opinion delivered upon the petition for rehearing Mr. Justice PHILLIPS distinguishes the case of Allen v. Flood, by pointing out the fact that in the latter case there was no contract the breach of which was induced by the defendant, while in the Doremus Case contracts existed in which the plaintiff had a property right, and which were broken as a result of the actions of the defendants; but, as we have already seen, the clear weight of authority is to the effect that, where the contact is one of employment, it is immaterial whether it is for a fixed period, or is one which is terminable by either party at will, both parties being

willing and desiring to continue the employment under that contract for an indefinite period.

We therefore conclude, both upon reason and authority, that where a third party induces an employer to discharge his employee who is working under a contract terminable at will, but under which the employment would have continued indefinitely, in accordance with the desire of the employer, except for such interference, and where the only motive moving the third party is a desire to injure the employee and to benefit himself at the expense of the employee by compelling the latter to surrender an alleged cause of action, for the satisfaction of which, in whole or in part, such third party is liable, and where such right of action does not depend upon and is not connected with the continuance of such employment, a cause of action arises in favor of the employee against the third party.

Appellee asked no instruction on the trial in the superior court. In addition to the instructions given at the request of appellant, the court gave one instruction of its own motion. In this instruction the word "plaintiff" was in one instance inadvertently used instead of the word "defendant," but we do not think the jury could have been misled thereby.

Other objections are made in reference to the action of the court in passing upon instructions and the admission of evidence. We have carefully considered these, and are of the opinion that the appellant sustained no wrong of which it can complain here.

It is urged that the verdict is excessive in amount. We have frequently held that this question is conclusively determined by the judgment of the Appellate Court.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

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§ 8. ASSENT OF PLAINTIFF, (A.)—CONTRACT EXEMPTION.

HARTFORD F. INS. CO. v. CHICAGO, M. & ST. P. R. CO.

(175 U. S. 91; 20 Sup. Ct. 33.—1899.)

Mr. Justice GRAY delivered the opinion of the court:

This was an action brought May 10, 1893, in the district court of Jones county, in the state of Iowa, against the Chicago, Milwaukee,

& St. Paul Railway Company, a railroad corporation of Wisconsin, by seven fire insurance companies, corporations of other states, to recover for the loss by fire, owing to the defendant's negligence, of a warehouse and goods, belonging to the partnership of Simpson, McIntire, & Company, and insured by the plaintiffs, who had paid the loss. * * * *

The plaintiffs demurred to the amended answer, on the ground that the stipulation in the lease, by which it was sought to exonerate the defendant from loss by fire caused by the negligence of itself or its servants, was void as against public policy.

The warehouse stood upon a strip of land belonging to the railroad company, by the side of its track, and part of its depot grounds at Monticello, in the state of Iowa. The sole right of the partnership in that strip was by virtue of an indenture of lease thereof, dated February 1, 1890, by which the railroad company leased it to the partnership for a year from that date, "for the purpose of erecting and maintaining thereon a cold-storage warehouse," at an annual rent of $5 payable in advance, "and upon the express condition that the said railway company, its successors and assigns, shall be exempt and released," and the lessees "do hereby expressly release them," from all liability or damage by reason of any destruction or injury of buildings then upon or afterwards placed on the land or of personal property inside or outside of those buildings, "by fire occasioned or originated by sparks or burning coal from the locomotives, or from any damage done by trains or cars running off the track, or from the carelessness or negligence of employees or agents of said railway company;" and the lessees covenanted in no way to obstruct or interfere with the track of the railroad company. The rest of the indenture consisted of covenants of the lessees to keep the premises in repair; to pay the rent and taxes so long as they remained in possession; to surrender possession to the lessor, at the expiration of the term, if then demanded, or before its expiration, or on default in payment of rent or taxes, within thirty days after demand; and not to underlease without the lessor's consent; with a further agreement that the lessees might, and, if required by the lessor, would, remove from the premises, within thirty days after any termination of the lease, all stations owned or placed thereon by them.

The indenture, in short, is a lease by the railroad company of a strip of its land by the side of its track to the partnership, for the

purpose of erecting and maintaining a cold-storage warehouse thereon, for one year and for such longer time as the lessee may be permitted by the lessor to remain in possession; and contains no further agreements, other than those usual between lessor and lessee, except a covenant of the lessee not to obstruct or interfere with the railroad track of the lessor, and an express condition of the lease and covenant of the lessee that the lessor shall not be liable to the lessee for any damage to the building or to personal property in or about it, by fire from the lessor's locomotive engines, or by trains or cars running off the railroad track, although owing to the negligence of the lessor or its servants.

The indenture contains no stipulation concerning, or even any mention of, any transportation of goods over the railroad, or any relation of the railroad company as a common carrier to the lessee or to the public; and there is nothing in the record to show that such a relation existed between the railroad company and the lessee, or that the warehouse was built or maintained for the benefit of the public, or of the railroad corporation, or of anyone but the partnership.

The decision of the case turns upon the question whether the provisions of this indenture, by which the railroad company is not liable for damage to the property by fire from its locomotive engines, owing to the negligence of itself or its servants, is void as against public policy.

The plaintiffs' counsel at the argument much relied on the cases in which similar provisions in the contracts of common carriers or of telegraph companies have been held to be void.

It is settled by the decisions of this court that a provision in a contract between a railroad corporation and the owner of goods received by it as a common carrier, that it shall not be liable to him for any loss or injury of the goods by the negligence of itself or its servants, is contrary to public policy, and must be held to be void in the courts of the United States, without regard to the decisions of the courts of the state in which the question arises. But the reasons on which those decisions are founded are that such a question is one of general mercantile law; that the liability of a common carrier is created by the common law, and not by contract; that to use due care and diligence in carrying goods intrusted to him is an essential duty of his employment, which he cannot throw off; that a common carrier is under an obligation to the public to carry all

goods offered to be carried within the scope and capacity of the business which he has held himself out to the public as doing; and that, in making special contracts for the carriage of such goods, the carrier and the customer do not stand on equal terms. New York C. R. Co. v. Lockwood, 17 Wall. 357, 21 L. ed. 627; Liverpool & G. W. Steam Co. v. Phœnix Ins. Co. 129 U. S. 397, 439–442, 32 L. ed. 788, 791, 792, 9 Sup. Ct. Rep. 469, and other cases there cited. Although a telegraph company is not a common carrier, yet its relation with senders of messages over its lines is of a commercial nature, and contracts that the company shall not be liable for the negligence of its servants are affected, in some degree, by similar considerations. Southern Exp. Co. v. Caldwell, 21 Wall. 264 269, 22 L. ed. 556, 558; Western U. Teleg. Co. v. Texas, 105 U. S. 460, 464, 26 L. ed. 1067, 1068; Primrose v. Western U. Teleg. Co. 154 U. S. 1, 38 L. ed. 883, 14 Sup. Ct. Rep. 1098; Western U. Teleg. Co. v. Cook, 15 U. S. App. 445, 61 Fed. Rep. 624, 9 C. C. A. 680; Harkness v. Western U. Teleg. Co. 73 Iowa, 190, 34 N. W. 811.

The plaintiffs further insisted that the same reasons apply universally, and should be held to defeat all contracts by which a party undertakes to put another at the mercy of his own faulty conduct. But the only authorities cited which support this proposition are a general statement in Cooley on Torts, 687, and an *obiter dictum* in Johnson v. Richmond & D. R. Co. 86 Va. 975, 978, 11 S. E. 829, and it is certainly too sweeping. Even a common carrier may obtain insurance against losses occasioned by the negligence of himself or of his servants, or may, by stipulation with the owner of goods carried, have the benefit of such insurance procured thereon by such owner. Phœnix Ins. Co. v. Erie & W. Transp. Co. 117 U. S. 312 29 L. ed. 873, 6 Sup. Ct. Rep. 750, 1176; California Ins. Co. v. Union Compress Co. 133 U. S. 387, 414, 33 L. ed. 730, 737, 10 Sup. Ct. Rep. 365; Wager v. Providence Ins. Co. 150 U. S. 99, 37 L. ed. 1013, 14 Sup. Ct. Rep. 55.

A railroad corporation holds its station grounds, railroad tracks, and right of way for the public use for which it is incorporated, yet as its private property, and to be occupied by itself or by others in the manner which it may consider best fitted to promote, or not to interfere with, the public use. It may, in its discretion, permit them to be occupied by others with structures convenient for the receiving and delivering of freight upon its railroad, so long as a free and safe passage is left for the carriage of freight and passen-

gers. Grand Trunk R. Co. v. Richardson, 91 U. S. 454, 23 L. ed. 356. And it must provide reasonable means and facilities for receiving goods offered by the public to be transported over its road. Covington Stock-Yards Co. v. Keith, 139 U. S. 128, 35 L. ed. 73, 11 Sup. Ct. Rep. 461. But it is not obliged, and cannot even be compelled by statute, against its will, to permit private persons or partnerships to erect and maintain elevators, warehouses, or similar structures for their own benefit, upon the land of the railroad company. Missouri P. R. Co. v. Nebraska, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130.

In the case at bar no one had the right to put a warehouse or other building upon the land of the railroad corporation without its consent; and the corporation was under no obligation to the public, or to the partnership, to permit the latter to do so. In granting and receiving the license from the corporation to the partnership to place and maintain a cold-storage warehouse upon a strip of such land by the side of the railroad track, and in erecting the warehouse thereon, both parties knew that its proximity to the track must increase the risk of damages, whether by accident or by negligence, to the warehouse and its contents, by fire set by sparks from the locomotive engines, or by trains or cars running off the track. The principal consideration, expressed in their contract, for the license to build and maintain the warehouse on this strip of land, was the stipulation exempting the railroad company from liability to the licensee for any such damages. And the public had no interest in the question which of the parties to the contract should be ultimately responsible for such damages to property placed on the land of the corporation by its consent only.

The case is wholly different from those cited by the plaintiffs, in which a lease by a railroad corporation, transferring its entire property and franchises to another corporation, and thus undertaking to disable itself from performing all the duties to the public imposed upon it by its charter, has been held to be *ultra vires*, and therefore void,—as in Thomas v. West Jersey R. Co. 101 U. S. 71, 25 L. ed. 950, and in Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478, and 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808.

Questions of public policy as affecting the liability for acts done, or upon contracts made and to be performed, within one of the states of the Union,—when not controlled by the Constitution, laws,

or treaties of the United States, or by the principles of the commercial or mercantile law or of general jurisprudence, of national or universal application,—are governed by the law of the state as expressed in its own Constitution and statutes, or declared by its highest court. Elmendorf v. Taylor, 10 Wheat. 152, 159, 6 L. ed. 289, 292; Bank of Augusta v. Earle 13 Pet. 519, 594, 10 L. ed. 274, 310; Vidal v. Philadelphia, 2 How. 127, 197, 11 L. ed. 205 233; Bucher v. Cheshire R. Co. 125 U. S. 555, 581, 584, 31 L. ed. 795. 798, 799, 8 Sup. Ct. Rep. 974; Detroit v. Osborne, 135 U. S. 492, 498, 499, 34 L. ed. 260, 262, 10 Sup. Ct. Rep. 1012; Union Nat. Bank v. Bank of Kansas City, 136 U. S. 223, 235, 34 L. ed. 341, 345, 10 Sup. Ct. Rep. 1013; Etheridge v. Sperry, 139 U. S. 266, 276, 277, 35 L. ed. 171, 176, 11 Sup. Ct. Rep. 565; Gardner v. Michigan C. R. Co. 150 U. S. 349, 357, 37 L. ed. 1107, 1109, 14 Sup. Ct. Rep. 140; Bamberger v. Schoolfield, 160 U. S. 149, 159, 40 L. ed. 374, 378, 16 Sup. Ct. Rep. 225; Missouri, K. & T. Trust Co. v. Krumseig, 172 U. S. 351, 43 L. ed. 474, 19 Sup. Ct. Rep. 179; Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A. 173 U. S. 99, 43 L. ed. 628, 19 Sup. Ct. Rep. 341.

The validity of the agreement now in controversy does not depend upon the Constitution, laws, or treaties of the United States, or upon any principle of the commercial or mercantile law, or of general jurisprudence.

Generally speaking, the right of a railroad corporation to build its road and to run its locomotive engines and cars thereon, within any state, is derived from the legislature of the state; and it is within the undisputed powers of that legislature to prescribe the precautions that the corporation shall take to guard against injuries to the property of others by the running of its trains, as well as the measure of its liability in case such injuries happen. Among the most familiar instances of the exercise of this power are statutes requiring a railroad corporation to erect fences between its road and adjoining lands, and subjecting it to either single or double damages for any injury to cattle or other animals caused by its neglect to do so. Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; Minneapolis & St. L. R. Co. v. Emmons, 149 U. S. 364, 37 L. ed. 769, 13 Sup. Ct. Rep. 870; and statutes making a railroad corporation liable for damages to property of others from fire set by sparks

from its locomotive engines, either independently of negligence on its part, or in case of such negligence only. St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243; Atchinson, T. & S. F. R. Co. v. Mathews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609.

As was well said by the circuit court in the case at bar, in a passage quoted by this court in St. Louis & S. F. R. Co. v. Mathews just cited: "The right to use the agencies of fire and steam in the movement of railway trains in Iowa is derived from the legislation of the state; and it certainly cannot be denied that it is for the state to determine what safeguards must be used to prevent the escape of fire, and to define the extent of the liability for fires resulting from the operation of trains by means of steam locomotives. This is a matter within state control. The legislation of the state determines the width of the right of way used by the companies. The state may require the companies to keep the right of way free from combustible material. It may require the depot and other buildings used by the company to be of stone, brick, or other like material, when built in cities, or in close proximity to other buildings. The state, by legislation, may establish the extent of the liability of railway companies for damages resulting from fires caused in the operation of the roads. 62 Fed. Rep. 907." 165 U. S. 17, 41 L. ed. 617, 17 Sup. Ct. Rep. 243.

[The statutes and decisions of Iowa, bearing upon the case, were then considered at length, and the conclusion reached, that the circuit court followed such statutes and decisions, in overruling the plaintiff's demurrer.]

See p. 75 in Lewis's notes.

TARBELL v. RUTLAND R. CO.

(73 Vt. 347; 51 At. 6.—1901.)

TYLER, J. Action, case, for defendant's negligence, through its servants and agents, in leaving, or permitting to be left, a car loaded with lumber to stand upon a side track in such proximity to the main track that the plaintiff's intestate, while descending a ladder on the outside of one of the cars which the defendant was operating on the main track, was struck, knocked from the car, and so injured that he died. The question before us is raised by the plaintiff's de-

murrer to the defendant's pleas, wherein it is alleged that the plaintiff, as next of kin of the intestate, Arthur W. Tarbell, before the latter's employment by the defendant, and in consideration that it would employ him, entered into a written agreement with the defendant by which the plaintiff released and discharged it from all damages that might accrue to the plaintiff, as next of kin of the intestate, by reason of the defendant's negligence during his employment. The defendant contends that, though such a contract between itself and the injured employee might not be upheld, this contract, being with the next of kin of the employee, does not contravene public policy.

The general rule of law is stated to be that whatever tends to injustice or oppression, restraint of liberty, and natural or legal right, or to the obstruction of justice, or to the violation of a statute, and whatever is against good morals, when made the subject of a contract, is against public policy, and void. It is said that they are not contracts, but unlawful agreements, which are void in their inception. 9 Am. & Eng. Enc. Law (1st Ed.) 880; 15 Am. & Eng. Enc. Law (2d Ed.) 932. The decision of this case may rest upon two grounds, and it may here be said that whether a contract not forbidden by law is immoral in its tendency, and should be declared void, is a question that must be left to the judgment of the court in which it is sought to be enforced; as, when a voter agreed to exert his influence in an election against what he believed was for the public good, the agreement was held void, though the voter resorted to no unlawful means in exerting his influence. Nichols v. Mudgett, 32 Vt. 546. There are many instances of this kind mentioned in Barron v. Tucker, 53 Vt. 338, 38 Am. Rep. 684. In general, when a contract belongs to a class which is reprobated by public policy, it will be declared illegal, though in that particular instance no actual injury has resulted to the public. If it is immoral, or contrary to the policy of the law, it will be declared void.

Contracts of the kind under consideration are clearly against public policy, and invalid, for the reason that they tend to promote negligence on the part of railroad companies in respect to the personal safety of their employees. But the policy of the law in respect to such contracts is declared in V. S. § 3924, which is: "When an engineer, fireman, or other agent of a railroad is guilty of negligence or carelessness, whereby an injury is done to a person or

corporation, he shall be imprisoned not more than one year, or be fined not more than one thousand dollars. This section shall not exempt a person or corporation from an action for damages." Sections 3886 and 3887 forbid railroad companies having ladders or steps upon cars of their own to the top on the sides of the cars, and require that they be placed upon the ends or inside of the cars, and a forfeiture of $50 a day is imposed as a penalty for failure to comply with the statute. It is the law that courts will not enforce contracts made for the purpose of violating statutes, but will hold them inoperative and void.

This subject is fully considered in Brooks v. Cooper, 50 N. J. Eq. 761, 26 Atl. 978, 21 L. R. A. 617, 35 Am. St. Rep. 793; Riley v. Jordan, 122 Mass. 231. It was aptly said by SHAW, C. J., in White v. Buss, 3 Cush. 448, that "the law, which prohibits the end, will not lend its aid in promoting the means designed to carry it into effect; * * * that it will not promote in one form that which it declares wrong in another." In Elkins v. Parkhurst, 17 Vt. 105, it was held that the imposition of a penalty implies prohibition. To the same effect is Bank v. Owens, 2 Pet., at page 539, 7 L. Ed. 512, where the court quotes from the opinion in Webb v. Pritchett, 1 Bos. & P. 264, as follows: "Then how shall an action be maintained in that which is a direct violation of public law? The contract is bottomed in *malum prohibitum* of a very serious nature in the opinion of the legislature. How, then, can we enforce a contract to do the very thing which is so much reprobated by the act?"

Railroad Co. v. Lockwood, 17 Wall. 357, 21 L. Ed. 627, does not controvert, but sustains, the rule of law above stated. As the purpose of the contract was to exempt the defendant from its statutory liability for its negligence, and thus defeat the statute, it was an immaterial fact that one of the contracting parties was the next of kin, and not the employee. It is held that the employee may stipulate that, if injured through the fault of the railroad company, he will then elect whether to accept certain benefits by means of a relief fund created by the company alone or with other companies, and that he will not claim double compensation; but in such cases it is said that he does not stipulate for the future, but accepts compensation for the injury already received. Railway Co. v. Moore (Ind. Sup.) 53 N. E. 290; Johnson v. Railroad Co., 163 Pa. 127, 29 Atl. 854. These cases do not support the defendant's position.

Griffiths v. Earl of Dudley, 9 Q. B. Div. 357, Railroad Co. v.

Bishop, 50 Ga. 465, and Railway Co. v. Hinzie, 82 Tex. 623, 18 S. W. 681, cited by defendant, sustain its contention that such contracts are not against public policy, and other courts of last resort have upheld them; but the general holding is against their validity, and for the reason, sometimes overlooked, that they offer a premium for carelessness. See Carroll v. Railway Co., 57 Am. Rep. 382, and notes. This disposes of the only question in the case, the demurrer to the declaration being waived by the defendant's repleading. Rea v. Harrington, 58 Vt. 184, 2 Atl. 475, 56 Am. Rep. 561; Houston v. Brush, 66 Vt. 331, 29 Atl. 380.

Judgment of the court below sustaining the plaintiff's demurrer and adjudging the pleas insufficient affirmed, and cause remanded.

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§ 8B.—LEAVE AND LICENSE.

BARHOLT v. WRIGHT.

(45 Ohio St. 177.—1887.)

The plaintiff below brought suit against the defendant to recover damages for an assault and battery committed upon his person. The answer was a general denial. Upon the trial of the issue, the jury, under the charge of the court, rendered a verdict for the defendant. A motion for a new trial, assigning error in the charge, was overruled by the court, and a bill of exceptions taken. Upon error the judgment was reversed in the Circuit Court, and the cause remanded for a new trial; and the defendant below now prosecutes error in this court to reverse the judgment of the Circuit Court.

The evidence is not set out in the bill of exceptions; but it appears from the bill, that, upon the trial, the plaintiff offered evidence tending to show that he and the defendant went out to fight by agreement and did fight, and was severely injured by the defendant; among other injuries inflicted upon him, one of his fingers was so bitten by the defendant that it had to be amputated. By reason of the injuries so received, he became ill, was disabled for work for a long time, and was put to considerable expense in being cured. The court, however, charged the jury that if the parties went out to fight by agreement, and the plaintiff received the injuries complained of from the defendant while the fight was going on and in

the course of it, he could not recover. The accuracy of this charge is the question presented by the record.

MINSHALL, J. It would seem at first blush contrary to certain general principles of remedial justice to allow a plaintiff to recover damages for an injury inflicted on him by a defendant in a combat of his own seeking; or where, as in this case, the fight occurred by an agreement between the parties to fight. Thus in cases for damages resulting from the clearest negligence on the part of the defendant, a recovery is denied the plaintiff, if it appear that his own fault in any way contributed to the injury of which he complains. And a maxim, as old as the law, *volenti non fit injuria*, forbids a recovery by a plaintiff where it appears that the ground of his complaint had been induced by that to which he had assented; for, in judgment of law, that to which a party assents is not deemed an injury. (Broom's Leg. Max. 268.)

But as often as the question has been presented, it has been decided that a recovery may be had by a plaintiff for injuries inflicted by the defendant in a mutual combat, as well as in a combat where the plaintiff was the first assailant, and the injuries resulted from the use of excessive and unnecessary force by the defendant in repelling the assault. These apparent anomalies rest upon the importance which the law attaches to the public peace as well as to the life and person of the citizen. From considerations of this kind it no more regards an agreement by which one man may have assented to be beaten, than it does an agreement to part with his liberty and become the slave of another. But the fact that the injuries were received in a combat in which the parties had engaged by mutual agreement, may be shown in mitigation of damages. (2 Greenleaf Ev. sec. 85; Logan v. Austin, 1 Stewart, 476.) This, however, is the full extent to which the cases have gone. We will notice a few of them. In Boulter v. Clark, an early case, an offer was made, under the general issue, to show that the plaintiff and the defendant fought by consent. The offer was denied; the Chief Baron saying, "the fighting being unlawful, the consent of the plaintiff to fight, if proved, would be no bar to his action." (Buller's Nisi Prius, 16.) A number of earlier cases were cited, and among them that of Mathew v. Ollerton, Comb. 218, where it said "that if a man license another to beat him, such license is void, because it is against the peace." It will be found upon examination that

this case was not an assault and battery; it was on an award that had been made by the plaintiff on a submission to himself. The remark, however, made in the reasoning of the court, is evidence of the common understanding of the law at that early day. In 1 Stephen's Nisi Prius, 211, it is said: "If two men engage in a boxing match, an action can be sustained by either of them against the other, if an assault be made; because the act of boxing is unlawful, and the consent of the parties to fight cannot excuse the injury." So in Bell v. Hansley, 3 Jones, N. C. 131, it was held that "one may recover in an action for assault and battery, although he agreed to fight with his adversary; for such agreement to break the peace being void, the maxim *volenti non fit injuria* does not apply." The following cases are to the same effect: Stout v. Wren, 1 Hawks, 420; Adams v. Waggoner, 33 Ind. 531; Shay v. Thompson, 59 Wis. 540; Logan v. Austin, 1 Stewart, 476. And so it was held in Commonwealth v. Collberg, 119 Mass. 350, that where two persons go out to fight with their fists, by consent, and do fight with each other, each is guilty of an assault, although there is no anger or ill-will. Champer v. State, 14 Ohio St. 437, is not in conflict with this, as will be explained hereafter.

No case has been cited that can be said to be to the contrary. What is said by PECK, J., in Smith v. State, 12 Ohio St. 466, that "an assault upon a consenting party would seem to be a legal absurdity," must be applied to the facts of that case. The judge was discussing the sufficiency of a count in an indictment for an assault with intent to commit a rape, without an averment that it was made forcibly and against the will of the female. The absence of consent is essential to the crime of rape, or of an assault with intent to commit a rape, where the female has arrived at the age at which consent may be given. Intercourse, because illicit, does not amount to an assault where the female consents, however wrong it may be in morals. This is all that was meant by the learned judge in using the language quoted from his opinion.

In all such cases the consent of the female would, without doubt, be a bar to any right she would otherwise have to maintain an action for an assault and battery. It is said by Judge COOLEY in his work on Torts, p. 163, that "consent is generally a full and perfect shield when that is complained of as an injury which was consented to. . . . A man may not even complain of the adultery of his wife, which he connived at or assented to. If he concurs in

the dishonor of his bed, the law will not give him redress, because he is not wronged. These cases are plain enough, because they are cases in which the questions arise between the parties alone." "But," he adds, "in case of a breach of the peace it is different. The State is wronged by this and forbids it on public ground. . . . The rule of law is therefore clear and unquestionable, that consent to an assault is no justification. The exception to this general rule embraces only those cases in which that to which assent is given is matter of indifference to public order." (See, also, to like effect, Pollock on Torts, 139.)

Neither is the case of Champer v. State, 14 Ohio St. 437, at variance with the principle upon which the plaintiff below seeks a recovery. The cases seems to have been somewhat misapprehended by the courts of some of the States, as well as by some text-writers. By the statutes of this State a distinct offense is made of an affray or agreement to fight; and the effect of the holding is that where such an offense is committed, the indictment must be for an affray, and not for an assault and battery. The civil right of either party to recover of the other for injuries received in an affray, is not affected by the Statute nor by the decision just referred to. Such seems to have been the view taken by BOYNTON, J., in the subsequent case of Darling v. Williams, 35 Ohio St. 63.

The case of Fitzgerald v. Cavin, 110 Mass. 153, is to the effect that consent is no bar to that which occasions bodily harm if the act was intentionally done.

It is upon the same principle of public policy that one, who is the first assailant in a fight, may recover of his antagonist for injuries inflicted by the latter, where he oversteps what is reasonably necessary to his defense, and unnecessarily injures the plaintiff; or that, with apparent want of consistency, permits each to bring an action in such case, the assaulted party for the assault first committed upon him, and the assailant for the excess of force used beyond what was necessary for self-defense. (Dole v. Erskine, 35 N. H. 503, criticising Elliott v. Brown, 2 Wend. 499; Cooley on Torts, 165; Darling v. Williams, 35 Ohio St. 63; Gizler v. Witzel, 82 Ill. 322. And see, also, Commonwealth v. Coleberg, *supra.*)

It would seem that under the code the right of each combatant to damages might be determined and measured in the same action. (Swan's Plead. Prec. 259, n. a.)

And upon like principle it has been ruled that the doctrine of

contributory negligence has no application to an action to recover damages for an assault and battery. (Ruter v. Foy, 46 Iowa, 132; Steinmetz v. Kelly, 72 Ind. 442; Whitehead v. Mathaway, 85 Ind. 85.) Negligence of the plaintiff contributing to the injury of which he complains, is taken into consideration only in those cases where the liability of the defendant arises from want of care on his part, occasioning injury to the plaintiff; it does not apply to the commission of an intentional wrong. * * * *

Judgment affirmed.

GOLDNAMER v. O'BRIEN.

(98 Ky. 669; 33 S. W. 831.—1896.)

HAZELRIGG, J. The appellants were sued by the appellee, Sallie O'Brien, for inducing her to submit to an attempted abortion on her person by a physician procured by them, and judgment was rendered for $1,700. If we assume from the proof that the appellants did in any way induce the appellee to resort to this method of hiding her shame,—and they deny this most earnestly,—it is clear from the testimony that she left her home, in Elizabethtown, and went to Louisville, in search of this relief, voluntarily, and alike voluntarily submitted herself to the treatment of a physician. Her pregnancy was not attributable to either of the appellants, and, at most, they may have urged the Louisville trip as the only means of securing the desired result, and may have furnished money, or otherwise assisted the plaintiff in the accomplishment of her purpose. While it is not directly shown that either of them employed or otherwise procured the physician, and such conclusion is based on the barest inference, yet this question was properly submitted to the jury, and we shall assume such a state of facts.

Waiving other questions, the important one on this appeal is, can the plaintiff maintain this action? Or, rather, as the petition avers an abduction and attempted abortion, against the plaintiff's will and consent, the question is, is she entitled to a judgment upon the state of fact thus assumed to exist, and apparently found to exist by the jury? The right to recover is, of course, clear, unless it is destroyed by the complainant's consent to the assault, and whether

this affects the right is a question of much conflicting authority. It may be stated, generally, that the suit of a wrongdoer will be rejected when seeking redress for another's having participated with him in the wrong. Thus, a woman who immorally yields to her seducer cannot sue, because she consented to and participated in the wrong whereof she complains. Bish. Noncont. Law, § 57; Cline v. Templeton, 78 Ky. 550. The author last quoted further says (section 196) that "rape, one of the most aggravated batteries, is, if the woman consents, neither rape, nor even assault," and that "the execution of any unlawful contract places it past annulment, and leaves no right of action in either party against the other. So that, though a mutual beating by consenting parties is a wrong against the public, because a breach of the peace, it is not such as between themselves, since neither can complain of that to which he consented." And the learned author, after citing a number of American and English cases to sustain the text, adds: "Such is the distinct and inevitable deduction of the reasoning of the law,—applicable, however, in all its consequences, only when the beating was not in excess of the consent. But we have American cases in which the judges have overlooked the distinction between the civil and criminal remedy, and so have held that one may maintain his civil suit for a battery to which he consented, and in which he participated. Decisions like these, proceeding on a misapprehension, and overlooking established law not brought to the notice of the judge, should not be followed in future cases."

To the same effect, Mr. Roscoe says (Rosc. Cr. Ev. 306): "In consequence of the natural desire not to permit a flagrant act of immorality to go unpunished, an attempt has frequently been made to treat that as an assault which is consented to on the part of the person who is the subject of the act. But on examination it will be found that there is no authority for such a position." The author cites numerous authorities supporting the text, but points out that not every act of submission implies consent. Thus, from the mere submission of a child or person of weak mind, consent is not necessarily to be presumed. In the case at bar, however, it would be too much to say that the act of the complainant was not willingly and intentionally done. In Wait, Act. & Def. p. 344, § 11, it is said: "An assault implies force upon one side, and repulsion, or at least want of assault, on the other. An assault upon a consenting party would therefore be a legal absurdity."

On the other hand, Mr. Cooley, in his work on Torts (page 163), says that "consent is generally a full and perfect shield, when that is complained of as a civil injury which was consented to. A man cannot complain of a nuisance, the erection of which he concurred in or countenanced. * * * But in case of a breach of the peace it is different. The state is wronged by this, and forbids it on public grounds. If men fight, the state will punish them. If one is injured, the law will not listen to an excuse based on a breach of the law." The rule of law is therefore clear and unquestionable that consent to an assault is no justification; and one wounded in a duel is said by the learned author to have a cause of action for damages against his adversary, for a consent which the law forbids cannot be accepted as a legal protection. Some of the cases cited by the author, however, are criminal prosecutions, but others support the text. These authorities seem to be irreconcilable. While we readily appreciate the argument that, so far as the state is concerned, no consent can be pleaded in justification, we have not been able to understand how, in a civil suit, in which the party consenting alone is interested, compensation can be allowed by the law. If both parties to the action are violators of the law, must the mouth of one be closed, and the complaint of the other heard? The parties stand on an exact equality before the law, and, if one wrongfully consented to beat another, the other as wrongfully consented to be beaten. * * * The instruction, therefore, asked by the appellants, —that, if the plaintiff voluntarily went to Louisville for the purpose of having the alleged abortion performed on her, the law was for the defendants,—should have been given.

Judgment reversed for proceedings inconsistent with this opinion.

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§ 8c. VOLENTI NON FIT INJURIA. – Assumption of risk

FITZGERALD v. CONN. RIVER PAPER CO.

(155 Mass. 155. 1891.)

Action for injuries sustained by falling down the icy steps of defendant's mill. Plaintiff was nonsuited and alleged exceptions.

KNOWLTON, J. There was evidence proper for the consideration

of the jury on the question whether the defendant corporation was negligent in permitting the steps on which the plaintiff was injured to be slippery and dangerous. It was its duty to provide on its premises a reasonably safe passageway for the use of its employees in going to and from their work; * * * and it was a question of fact for the jury whether the plaintiff was in the exercise of due care in trying to go down the steps as she did at the time of the accident. The fact that she knew them to be icy; and more or less slippery and dangerous, does not require us to hold as a matter of law that she was negligent in trying to go down them, holding by the rail, especially if she had no other way of getting from the mill. The ground on which the ruling for the defendant was made was doubtless that the plaintiff, knowing the icy condition of the steps, assumed the risk of accident, thereby precluding herself from recovering. It is well settled that a servant assumes the obvious risks of the service into which he enters, even if the business be ever so dangerous, and if it might easily be conducted more safely by the employer. This is implied in his voluntary undertaking, and it comes within a principle which has a much broader application, and which is expressed in the maxim, *volenti non fit injuria.* The reason on which it is founded is that, whatever may be the master's general duty to conduct his business safely in reference to persons who may be affected by it, he owes no legal duty in that respect to one who contracts to work in the business as it is. In the present case it does not appear that the steps were icy, or that there was any reason to suppose that the business involved a risk in regard to them, when the plaintiff entered the defendant's service. It cannot be held that when she made her contract she assumed the risk of such an injury as she afterwards received. We therefore come to the question whether, by her conduct since, she has assumed such a risk.

The doctrine, *volenti non fit injuria,* has not been very much discussed in the cases in this Commonwealth, but it is well established in the law, and it has been repeatedly recognized by this court. (Horton v. Ipswich, 12 Cush. 488, and other cases.) In England it has been much discussed, and the difficulties in the application of it have frequently been considered by the courts. The rule of law, briefly stated, is this: One who knows of a danger from the negligence of another, and understands and appreciates the risk therefrom, and voluntarily exposes himself to it, is precluded from recover-

ing for an injury which results from the exposure. It has often been assumed that the conduct of the plaintiff in such a case shows conclusively that he is not in the exercise of due care. Sometimes it is said that the defendant no longer owes him any duty; sometimes that the duty becomes one of imperfect obligation, and is not recognized in law. In one form or another the doctrine is given effect, as showing that, in a case to which it applies, there is either no negligence towards the plaintiff on the part of the defendant, or a want of due care on the part of the plaintiff. In Thomas v. Quartermine, 18 Q. B. Div. 685, BOWEN, L. J., says: "the duty of an occupier of premises which have an element of danger upon them reaches its vanishing point in the case of those who are cognizant of the full extent of the danger and voluntarily run the risk." It would be unjust that one who freely and voluntarily assumes a known risk for which another is, in a general sense, culpably responsible, should hold that other responsible in damages for the consequences of his own exposure. * * * It may be said that the voluntary conduct of the plaintiff in exposing himself to a known and appreciated risk is the interposition of an act which, as between the parties, makes the defendant's act, in its aspect as negligent, no longer the proximate cause of the injury; or, at least, is such participation in the defendant's conduct as to preclude the plaintiff from recovering on the ground of the defendant's negligence. Certainly it would be inconsistent to hold that a defendant's act is negligent in reference to the danger of injuring the plaintiff, and that the plaintiff is not negligent in voluntarily exposing himself when he understands the danger. It is to be remembered that, in determining whether a defendant is negligent in a given case, his duty to the plaintiff at the time is to be considered, and not his general duty, or his duty to others. Therefore, when it appears that a plaintiff has knowingly and voluntarily assumed the risk of an accident, the jury should be instructed that he cannot recover, and should not be permitted to consider the conduct of the defendant by itself, and find that it was negligent, and then consider the plaintiff's conduct by itself, and find that it was reasonably careful. But this principle applies only when the plaintiff has voluntarily assumed the risk. As is said by BOWEN, L. J., in Thomas v. Quartermaine, *supra,* the maxim is not *scienti non fit injuria,* but *volenti non fit injuria.* The chief practical difficulty in applying it is in determining when the risk is assumed voluntarily. In the first place,

one does not voluntarily assume a risk who merely knows that there is some danger, without appreciating the danger. On the other hand, he does not necessarily fail to appreciate the risk because he hopes and expects to encounter it without injury. If he comprehends the nature and the degree of the danger, and voluntarily takes his chance, he must abide the consequences, whether he is fortunate or unfortunate in the result of his venture. Sometimes the circumstances may show as a matter of law that the risk is understood and appreciated, and often they may present in that particular a question of fact for the jury.

What constraint, exigency, or excuse will deprive an act of its voluntary character when one intentionally exposes himself to a known risk is a question about which learned judges differ in opinion. It has been held by some that where a man is not physically constrained, where he can take his option to do a thing or not to do it, and does it, he must be held to do it voluntarily. See opinion of Lord BRAMWELL in Membery v. Railway Co., L. R. 14 App. Cas. 179, and the dissenting opinion in Eckert v. Railroad Co., 43 N. Y. 502. But by the authorities generally, one who in an exigency reluctantly determines to take a risk is not held so strictly. There has been much difference among the English judges in regard to the question whether a servant who discovers a defect in machinery, not existing when he entered the service, which the master is bound to repair, and who works on, understanding the danger, rather than to lose his place by complaining of it or refusing to work until it is repaired, shall be held to have voluntarily assumed the risk. In Membery v. Railway Co., *supra*, Lord BRAMWELL expresses the opinion that the plaintiff cannot recover in such a case, while the Lord Chancellor and Lord HERSCHELL, without expressing an opinion, prefer to keep the question open for future consideration. In Thrussell v. Handyside, 20 Q. B. Div. 359, the Court of Queen's Bench holds that a workman, by continuing to work under such circumstances, does not voluntarily assume the risk; and in Yarmouth v. France, 19 Q. B. Div. 647, a majority of the Court of Appeal are of the same opinion.* * * In Goodnow v. Mills, 146 Mass. 261, it is said that "there was no danger which, in view of the plaintiff's knowledge and capacity, must not have been well understood by or apparent to him, and there was therefore no negligence on the part of the defendant in exposing him to it." * * * In this Commonwealth, as well as elsewhere, plaintiffs

have been precluded from recovering, alike where their assumption of the risk grew out of an implied contract in reference to the condition of things at the time of entering the defendant's service, and where they voluntarily assumed a risk which came into existence afterwards. (Moulton v. Gage, 138 Mass. 390, and other cases.) * * * Whether the fear of losing one's situation would constitute such an exigency, where the place had become dangerous by reason of the negligence of the employer to repair it, especially if notice of the danger had been given by the servant, and there had been a promise speedily to repair it, we need not decide in this case. (See Leary v. Railroad, 139 Mass. 580; Haley v. Case, 142 Mass. 316.) v. Railroad, 139 Mass. 580; Haley v. Case, 142 Mass. 316.)

We are of opinion that it cannot be said as a matter of law that the plaintiff in the present case, in attempting to go down the steps, voluntarily assumed a risk which she understood and appreciated, and which resulted in the accident. She knew that the steps were icy, and that there was some danger in passing over them. But the evidence tended to show that their condition in regard to slipperiness was constantly changing in different states of the weather, with the spray falling daily from steam-pipes and freezing upon them. Common experience tells us that the degree of slipperiness of ice is not always determinable from an ocular inspection of it. If it were certain that the extent of the danger was obvious to one who saw the surface of the steps, the case would be different. Besides, there was evidence tending to show that she had no way of leaving the defendant's mill except by going down the steps, and that was important to be considered in deciding whether she took the risk voluntarily. Osborne v. Railroad Co., 21 Q. B. Div. 220, a case in which the plaintiff sued to recover for an injury received in going down some icy stone steps, is precisely in point. It is said in the opinion, referring to the language of the justices in Yarmouth v. France, and Thomas v. Quartermaine, *supra,* that "those observations go far to make it hard for a defendant to succeed on such a defense as that relied on here; for it is probable that juries would find for plaintiffs on the ground that they had not full knowledge of the nature and extent of the risk. But that cannot be helped. * * * These judgments introduce an important qualification of the maxim, *volenti non fit injuria.* In the present case the plaintiff may well have misapprehended the difficulty and danger which he would encounter in descending the steps; for instance,

he might easily be deceived as to the condition of the snow." We are of opinion that the case should have been submitted to the jury.

Exceptions sustained.

HOWEY v. FISHER.

(122 Mich. 43; 80 N. W. 1004.—1899.)

PER CURIAM. Plaintiff received injuries from stepping on an icy sidewalk. She brings this action against the defendant, who is the owner of a lot abutting upon the street, claiming that the eaves trough upon his house situated on this lot had been for a considerable time out of repair, and that the formation of the ice which caused the injury was the result of water carried from defendant's premises to the walk by reason of such defective eaves trough. * * * It appeared from other testimony in this case that there was a walk to the street leading from the side door of the house, and that there was a driveway from the street to the barn. One witness, called by plaintiff, testified, "If any one wanted to avoid the ice, they could step out off the walk to the street, go around the icy place, and back by the stable door to the brick barn." Plaintiff's counsel call attention to the statements of this witness to the effect that sleighs and carriages run out of the barn, and, standing there, would prevent one from stepping off the sidewalk into the street. But this witness testified, as to the location of the rigs, that "they stood between the walk from the side door to the curb and the cobblestone way to the barn." It is apparent from this testimony that the plaintiff knew of the risk of passing over this icy way, and assumed the risk of doing so, although there was a way to avoid this danger by stepping out into the street for a short distance. The precise danger was before her, and she had it in mind at the time. The case is quite different from those in which it has been held that possessing knowledge of a defect in a way will not preclude recovery, where it appears that the plaintiff was, notwithstanding, in the exercise of due care. Graves v. City of Battle Creek, 95 Mich. 266, 54 N. W. 757, 19 L. R. A. 641; Lowell v. Watertown Tp., 58 Mich. 568, 25 N. W. 517; and cases of this class. In neither of these cases was the plaintiff at the very moment of the accident aware that, at the very place where he then was, he was encountering the danger or taking the risk of injury.

In the present case there was nothing to distract plaintiff's attention. She could and did see the danger. She could have avoided it by going around the icy place. The case of Black v. City of Manistee, 107 Mich. 61, 64 N. W. 868, cannot be distinguished from this, in principle. See, also, Grandorf v. Railway Co., 113 Mich. 496, 71 N. W. 844; Cosner v. Centerville (Iowa) 57 N. W. 636; Ray v. City of Poplar Bluff, 70 Mo. App. 252.

We think that a verdict should have been directed for the defendant, and, inasmuch as this conclusion is based on plaintiff's testimony, the judgment will be reversed, and no new trial ordered. The other justices concurred.[1]

[1] In English v. Amidon, 72 N. H. 361, 56 At. 548 (1902), the court said: "Did the plaintiff voluntarily assume the risk of the defendant's negligence? "One does not voluntarily assume a risk, within the meaning of the rule that debars a recovery, when he merely knows there is some danger, without appreciating the danger." Mundle v. Company, 86 Me. 400, 405, 30 Atl. 16; Demars v. Company, 67 N. H. 404, 40 Atl. 902. One cannot be said, as a matter of law, to assume a risk voluntarily, though he knows the danger and appreciates the risk, if at the time he was acting "under such an exigency, or such an urgent call of duty, or such constraint of any kind, as in reference to the danger deprives his act of its voluntary character" or if, after discovering the master's neglect, he "has no opportunity to leave the service before the injury is received" (Olney v. Railroad, 71 N. H. 427, 431, 52 Atl. 1097).

When the plaintiff went into the mill it was daylight. He knew that his work would not be finished before 9 o'clock that night, and that it was the custom of the defendants to then have the stairway lighted. He had the right to believe they would perform their duty on the night in question, and to rely thereon. He entered the mill, worked until 9 o'clock, and then went to the stairway to go out. On reaching it he found himself surrounded in darkness. Although he then knew the defendants had failed to perform their duty, yet in view of the fact that he then had no choice open to him, the only exit provided being over the dark stairway, and no opportunity to leave the defendants' service before his injury was received, it cannot be said, as a matter of law, that he voluntarily assumed the risk. It was for the jury to say whether the plaintiff, knowing the defendants' neglect of duty, fully appreciated the danger therefrom and voluntarily encountered it. Demars v. Company, *supra;* Whitcher v. Railroad, 70 N. H. 242, 46 Atl. 470; Dempsey v. Sawyer, 95 Me. 295, 49 Atl. 1035; Fitzgerald v. Company, *supra;* 47 L. R. A. 161, 201, note.

Exception sustained.

EVANS v. WAITE.

(83 Wis. 286.—1892.)

It is charged in the complaint that "on July 4, 1891, while the plaintiff was lawfully riding on horseback on the public highway, in company with defendant, the defendant, being then and there armed with a revolver loaded with powder and leaden ball, negligently and carelessly discharged the said revolver so that the ball therefrom struck the plaintiff in the hip, and passed on through the flesh into his thigh, where it became lodged and imbedded so that it was impracticable to remove the same, and that the said ball so fired from the revolver in the hands of the defendant caused a deep, painful, and dangerous wound." It is further alleged that the defendant is a minor of about the age of 18 years. The defendant answered by his guardian: (1) A general denial; and (2) that the plaintiff was guilty of contributory negligence, in that he enticed the defendant to go with him for the purpose of shooting, and that while the parties were shooting the plaintiff was accidentally injured, and not through any negligence of the defendant. On the trial it was proved that the defendant was a minor; that on the occasion mentioned in the pleadings he was armed with a revolver; and that the plaintiff was wounded, as charged in the complaint, by a bullet discharged from the revolver, by accident, when in the hands of the defendant. The circuit judge held that, because the defendant was a minor, and was armed with a revolver, in violation of chapter 329, Laws 1883, (Sanb. & B. Ann. St. § 4397 *b*,) he was liable to the plaintiff for the injury, without regard to the question of negligence. Thereupon the jury were instructed to find for the plaintiff, and to assess damages for the injury. The court confined the recovery to compensatory damages. The jury assessed plaintiff's damages at $375, nearly $150 of which was for actual necessary expenses incurred by the plaintiff, and for loss of time by reason of the injury. A motion for a new trial was denied, and judgment entered for the plaintiff pursuant to the verdict. The defendant appeals from the judgment.

LYON, C. J. In Shay v. Thompson, 59 Wis. 540, it was held that if two persons, by mutual consent, in anger, fight together, each is liable to the other for actual damages. The fighting being unlaw-

ful, the consent of either party is no bar to the action. The authorities upon which the decision is based are cited in the opinion. The rule of that case applies here. It was unlawful for the defendant to be armed with a revolver when the plaintiff was injured, and hence he is liable for any injury inflicted by him with such weapon. It is immaterial that the plaintiff was consenting to the defendant being so armed, and to his use of the revolver. Such is the rule of Shay v. Thompson. The only effect of such consent was to confine the recovery to compensatory damages, and it was so restricted. The question of negligence is also immaterial. True, the complaint charges that the defendant was negligent, but it also contains a sufficient statement of a cause of action based upon the fact that the defendant was unlawfully armed with the revolver with which he wounded the plaintiff. * * * We fail to find any error disclosed in the record.

The judgment of the Circuit Court must be affirmed.

SCANLON v. WEDGER; BURNHAM v. SAME; MASON v. SAME; AR FOON v. SAME.

(156 Mass. 462.—1892.)

ALLEN, J. The several plaintiffs were injured by the explosion of a bomb or shell during a display of fireworks in Broadway square, which was a public highway in Chelsea. This display was made by the defendant Wedger, who acted under a license from the mayor and aldermen of Chelsea for a display of fireworks in Broadway square on that evening, under Pub. St. c. 102, § 55. A verdict was returned for the defendant, and the jury made a special finding that the defendant, in firing the bomb, exercised reasonable care. The case comes to us on a report, which states that if, on the facts contained therein, and on said finding, the plaintiffs are entitled to recover, the case is to be remitted to the Superior Court for the assessment of damages; otherwise judgments are to be entered for the defendant. It is therefore to be considered whether it appears affirmatively that the plaintiffs were entitled to recover.

The plaintiffs apparently were present at the display of fireworks as voluntary spectators, and were of ordinary intelligence. No

fact is stated in the report to show the contrary, nor has any suggestion to that effect been made in the argument. The plaintiffs have not rested their claims at all upon the ground that they were merely travelers upon the highway, or that they were unaware of the nature and risk of the display. The report says: "A considerable number of persons were attracted to said square by said meeting, and said bombs and other fireworks which were being exploded there. A portion of the center of the square about 40 by 60 feet was roped off by the police of said Chelsea, and said bombs or shells were fired off within the space so inclosed, and no spectators were allowed to be within said inclosure. * * * The plaintiffs were lawfully in said highway at the time of the explosion of said mortar, and near said ropes, and were in the exercise of due care." The bombs or shells are described in the report, and they were to be thrown from mortars into the air, it being intended that they should explode in the air, and display colored lights. They were apparently a common form of fireworks, such as has long been in use. The ground on which the plaintiffs place their several cases is that Pub. St. c. 102, § 55, did not authorize the mayor and aldermen of Chelsea to license the firing of anything but rockets, crackers, squibs, or serpents, and that, therefore, the act of the defendant in firing bombs or shells was unauthorized and unlawful. It is not contended that it was at the time supposed either by the defendant or by anybody else that the license was insufficient to warrant the display which was actually made. The licensee was the chairman of a committee which had a political meeting in charge, and the defendant acted at the request of the committee, and was directed by them as to when and where to fire off the fireworks. Under this state of things, it must be considered that the plaintiffs were content to abide the chance of personal injury not caused by negligence, and that it is immaterial whether there was or was not a valid license for the display. If an ordinary traveler upon the highway had been injured, different reasons would be applicable. Vosburg v. Moak, 1 Cush. 453; Jenne v. Sutton, 43 N. J. Law. 257; Conradt v. Clauve, 93 Ind. 476. But a voluntary spectator, who is present merely for the purpose of witnessing the display, must be held to consent to it, and he suffers no legal wrong if accidentally injured without negligence on the part of any one, although the show was unauthorized. He takes the risk. (See Poll. Torts, 138–144.) In the

opinion of a majority of the court, the entry must be, judgment for the defendant.

MORTON, J. I dissent from the opinion of the majority of the court. The majority regard as immaterial the question whether the license was valid or not. It may be treated therefore, as void, as I think it was. If it was void, then the defendant, Wedger, was using the highway for a purpose that was dangerous, unlawful, wrongful, and unjustifiable as against anybody lawfully in the highway and in the exercise of due care, as it is expressly found that the plaintiffs were, and is liable for any injury caused to them by the explosion, whether they were travelers or not, unless they participated or aided in the display, or contributed by their own conduct to their injuries, or assumed the risk of injury. It is not claimed that there is any evidence that they participated or aided in the display. There is no evidence that they were guilty of contributory negligence. It is said, however, that they assumed the risk. What are the facts? Merely that a political meeting was being held in the square, to which a considerable number of persons had been attracted, and that bombs and other fireworks were being discharged there; and that at the time of the explosion the plaintiffs were near the rope that inclosed the space that had been roped off for discharging the fireworks, but were lawfully there, and in the exercise of due care. There is no evidence that they knew or had any reason to suppose that such mortars were liable to explode and injure bystanders, or that they were familiar with their construction, or the manner in which they were fired, or were aware that the bombs were charged with an explosive more powerful than ordinary gunpowder. There is nothing to show that they had any knowledge or suspicion that they were incurring any risk by being where they were. An inference or a conclusion that they were not unaware of the risk rests, it seems to me, entirely on assumption. The most that can be said of them is that they were voluntary spectators of the display. But before they can be held to have assumed the risk, it must appear that they knew all the facts material to the risk, and appreciated and understood it. (Citing cases.) It is carrying the doctrine of assumption of the risk further than I think it has ever been carried to say that one who, being lawfully on the highway, and in the exercise of due care, observes as a spectator an unlawful and dangerous exhibition in it, assumes the

risk. The exhibitor is bound at his peril to see that he has a valid license. If he selects the highway for an unlawful and dangerous display designed or calculated to attract the public, he, and not the spectators, assumes the risk of injury. It is of no consequence that the defendant exercised reasonable care in firing the bomb. It is a contradiction of terms to say of one engaged in an unlawful, dangerous, wrongful, and unjustifiable business that he used due care in it. Due care is predicated of something which a person may lawfully do, but which by his negligent manner of doing it may become injurious to others; not of something which he has no right whatever to do. Further, the question of assumption of the risk is ordinarily one of fact for the jury. (Cases *supra*.) The plaintiffs are not bound to show that they did not assume the risk. Unless it appears that they did, they are entitled to recover. This court cannot say as matter of law upon the facts stated that the plaintiffs assumed the risk. Nothing is disclosed as to the circumstances under which the plaintiffs were present. For aught that appears, they might have been travelers stopping for a moment on their way through the square, or detained by the crowd. It is difficult to see what the plaintiffs' supposition (if they did suppose it) that the exhibition was a lawful one had to do with their assumption of the risk; and still more difficult to see it if the exhibition was, as it proved to be, unlawful. I understand the question submitted to this court by the report to be whether, upon the facts therein stated, and upon the finding of the jury as to reasonable care on the part of Wedger, the plaintiffs were entitled to recover. I think they were, and that no other conclusion is warranted on principle or by authority. Vosburgh v. Moak, 1 Cush. 453; Cole v. Fisher, 11 Mass. 137; Moody v. Ward, 13 Mass. 299; Congreve v. Smith, 18 N. Y. 79; Congreve v. Morgan, Id. 84; Cohen v. Mayor, etc., 113 N. Y. 532; Jenne v. Sutton, 43 N. J. Law. 257; Fletcher v. Rylands, L. R. 1 Exch. 265, 279, *et seq.* * * * I think, therefore, that, in accordance with the terms of the report, the entry should be, cases remitted to the Superior Court for the assessment of damages. KNOWLTON, J., concurs in this opinion.

HORTON v. WYLIE.

(115 Wis. 505 ; 92 N. W. 245.—1902.)

An action to recover for personal injuries caused by a loaded revolver in defendant's hand, while the parties—boys about thirteen years of age—were playing "cowboy," as they called it. After they had alternately pointed it at each other, the defendant pointed it at the plaintiff at close range and at full cock. Previous to this it appears that it had not been cocked. The plaintiff testified that the defendant told him to get down on his knees and say his prayers, and that it was the last he was going to breathe, and that the defendant had a determined look on his face; but the defendant testifies that he does not remember the language that passed at the time. The plaintiff struck up the revolver with his hand, and at the same moment it went off, inflicting a wound in the head, over the eye. The bullet itself was never extracted or found, and there was some conflict in the evidence as to whether it penetrated the skull, or was lodged between the plates of the skull. There was some testimony tending to show that the sight of the plaintiff's left eye was seriously and permanently injured as a result of the shot; also that the ultimate result to the plaintiff would be fatal. The jury returned a general verdict for the plaintiff for $1,800 damages, and from judgment thereon the defendant appeals.

WINSLOW, J. The trial judge charged the jury, in substance, that under the facts shown the plaintiff was entitled to recover his actual damages, because the defendant was at the time of the shooting violating the law of the state forbidding a minor from being armed with a dangerous weapon (section 4397b, Sanb. & B. Ann. St.), by reason of which violation the injury complained of occurred. This instruction was duly excepted to, and the defendant, on the other hand, requested the following instruction, which was refused, and exception taken: "If the jury are satisfied from the evidence that the boys, Ralph Wylie and Clark Horton, at the spot where the shot occurred, had the revolver there in common, both taking part freely in the use of it for the purpose of play and amusement, and for no other purpose, and with no other intent on the part of either, and that the shot was the result of pure accident, caused by the boy, Clark Horton, throwing up his hand and striking

the revolver and causing it to explode, and thus causing the whole of the injury complained of, the jury should find for the defendant." The ruling of the trial judge was plainly right. The case is ruled by the case of Evans v. Waite, 83 Wis. 286, 53 N. W. 445, where it was held that the accidental discharge of a revolver in the hands of a minor, by which another was injured, was an actionable wrong, and that a verdict for the plaintiff for compensatory damages was properly directed on such a showing, notwithstanding the fact that the plaintiff knew that the defendant was armed, and consented thereto. The present case is even stronger than Evans v. Waite, because in this case the defendant was not only violating the law forbidding minors to go armed with a revolver, but was also violating section 4391, Sanb. & B. Ann. St., which makes it unlawful for any one to intentionally point a gun or a pistol at another. There are some assignments of error based upon the ruling upon evidence, but they are plainly not well founded, and we do not deem them of sufficient importance to justify detailed discussion.

Judgment affirmed.

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§ 8D. ASSUMPTION OF RISK.

D. H. DAVIS COAL CO. v. POLLAND.

(158 Ind. 607; 62 N. E. 492.—1901.)

BAKER, J. Appellee had judgment against appellant for personal injuries. The assignments are that the court erred in overruling appellant's demurrer to the complaint. * * * Two question arise on the complaint,—assumption of risk, and contributory negligence.

First. The complaint does not negative the employee's knowledge of the employer's negligent failure to perform the duties imposed by statute, and of the dangers resulting therefrom. If the cause of action in this case were based upon the employer's neglect to perform a common-law duty, or if there were no valid distinction between neglect of a common-law duty and neglect of a specific statutory duty, the complaint would be fatally defective. Ames v. Railway Co., 135 Ind. 363, 35 N. E. 117; Railroad Co. v. Kemper, 147 Ind. 561, 47 N. E. 214; Whitcomb v. Oil Co., 153 Ind. 513, 55 N. E. 440. By the common law an employer is required to exercise that degree of care in providing his employee a safe working place and

tools and appliances which a reasonably prudent person would exercise under like circumstances. The rule is general. There is no fixed quantum of care that must be exercised invariably in all cases. In each case the quantum of care required by the common-law rule is dependent largely upon the circumstances of that case, and, to quite an extent, upon what the jury and court may think a reasonably prudent person would have done under those circumstances. The manner of constructing the working place, and the selection of tools and appliances, and the keeping of them in proper repair, therefore, are left to the employer's judgment and discretion without limitation except this: that he must do what a reasonably prudent person would do in his place. Now, if the employer does what he thinks comes up to this general standard, and if the employee examines the place and appliances, adds his judgment to that of the employer, and agrees, as one of the terms of his contract of employment, that the employer has done all that a reasonably prudent person should do under the circumstances, and that he will notify the employer of after-occurring defects, the employee expressly assumes the risks that are known to him or might have become known by the exercise of ordinary care, of which he has made no complaint to the employer. So, also, the conditions being the same, except that the assumption of risk is not expressly included in the contract of employment, the law reads into the contract, from the employee's knowledge and silence, his agreement to assume all known and obvious risks.

Whether express or implied, assumption of risk is a matter of contract. In either case the employee whose injury is due to a known or an obvious defect in place or appliances, which he has suffered to continue without objection, cannot hold the employer liable,—not because the employer was not in fact negligent, for he may not have exercised ordinary care; not because the employee was contributorily negligent, for at the time and under the circumstances of the accident he may have used due care to avoid injury; but because the employee has agreed for a sufficient consideration to absolve the employer, and to assume for himself the risk of such injury. If a statute is a mere affirmation of the common-law duty of the employer with respect to providing safe working places and tools, the rule as to assumption of risk remains in force. The standard of care continues to be the conduct of the reasonably prudent person under like circumstances, and the means of measur-

ing up to it may still be the subject for the joint judgment and agreement of the employer and the employee.

If, however, the statute, as in this case, sets up a definite standard, and requires specific measures to be taken by the employer in providing safe working places and appliances, other considerations come into view. The very fact of such legislation indicates that the lawmakers believed that the operation of the common-law rules did not afford the employee sufficient protection; that, under the development of the modern industrial system, tending to centralization of capital and impersonal management, the employee did not stand upon a footing of equality with the employer in contracting for his safety; and that the necessity of earning the daily wage frequently constrained the employee to put up with defective place and tools without complaint, by reason of his fear of the consequences of complaining. From these conditions grew the necessity, or at least the propriety, of requiring certain specific measures to be taken for the protection of employees. The manner of constructing and maintaining the working places and appliances so as to measure up to the general standard of the reasonably prudent person was no longer left to the judgment of the employer. A definite standard was fixed by the legislature. It is the duty of the employer to use the very means named in the statute. He is not at liberty to adopt others, though, in his opinion, they are more efficacious than those prescribed by the lawmakers. How, then, can there be any lawful basis for an agreement, implied or express, that the employer shall violate the law, and that the employee shall be remediless?

The doctrine of assumed risk, in its essential nature, constitutes a defense. The employee brings his action for damages for personal injury. It is based upon the employer's negligent failure to discharge a duty owing to the employee. Duties and rights are correlative,—what is the duty of the employer to do for his employee, is the right of the employee to require of his employer. The employer says, "You have no right of action against me, because you contracted with me long before the accident happened that you would assume the very risk you are now complaining of." Such a contract, when the duty of the employer and the right of the employee are measured by the indefinite standard of care that a reasonably prudent person would have exercised under like circumstances, is enforceable. And so the heart of the present case is this: Is a

contract enforceable by which the employee waives in advance his right of having, and relieves his employer of the duty of providing, the specific safeguards required by the statute? The statute does not, in terms, forbid the making of such a contract; and it is said that the court should not hold it to be impliedly forbidden, because, for one thing, the statute provides a punishment by fine for the employer's violations, and a second punishment for the same offense is not permissible. The action of the employee is solely to recover compensation for actual damages. The payment of compensative damages is not punishment. The right of the state to recover a penalty and the right of an aggrieved party to recover compensation are not inconsistent. Indeed, the right to the penalty (in the form of punitive damages) as well as to compensation might have been given to the aggrieved party,—as in the telegraph cases.

Since the two rights (or sanctions for enforcing observance) are independent of each other, the presence of the penal provision in the statute makes neither for nor against the right to compensation free from the defense of assumed risk. The case stands as if the employer's failure to comply with the requirements of the act had not been made a misdemeanor. It is true, as propounded by counsel, that the state cannot compel an injured employee to bring an action for damages, nor prevent his settling or dismissing it if begun. But the legislature may well have believed that the natural desire of employees to recover compensation for injuries would lead employers to fulfill the law. At any rate, those employers who are brought into court to defend have nothing to complain of on this score. The employee's right to control his lawsuit, however, does not touch the question of his right to bind himself in advance to absolve the employer from the performance of specific statutory duties. Freedom of contract should not be lightly interfered with. As a general rule, the right of contracting as one sees fit stands untrammeled. But the state has power to restrict this right in the interest of public health, morals, and the like. When, in the present case, it is pointed out that the legislature has failed in terms to deny the employee's right to assume the risks from his employer's disregard of the statute, the question is not ended.

If the legislature has clearly expressed the public policy of the state on a matter within its right to speak upon authoritatively, and if that public policy would be subverted by allowing the employee to waive in advance his statutory protection, the contract

is void as unmistakably as if the statute in direct words forbade the making of it. If mines and factories and stores and railroads were to stand vacant, were not to be operated by citizens in whose lives and limbs the state has an interest, it is inconceivable that the legislature would have spoken as it has, even if it had authority to do so. To promote safety to life and limb, as indisputably as to advance public health, education, and morals, to prohibit usury, to provide for exemption and stay of execution, the legislature has the right to act.

The statute in question is not class legislation. Employments differ in degree of hazard. Each has its separate dangers, which must be guarded against in the appropriate way. To classify legislation by distinctions that naturally inhere in the subject-matter is not to indulge in class legislation. A law is general and uniform if all persons in the same circumstances are treated alike. The purpose of this statute to promote the safety of miners being clear, and the right of the legislature to pass it being unquestionable, the court should not declare it a dead letter. If the employer may avail himself of the defense that the employee agreed in advance that the statutes should be disregarded, the court would be measuring the rights of the persons whom the lawmakers intended to protect by the common-law standard of the reasonably prudent person, and not by the definite standard set up by the legislature. This would be practically a judicial repeal of the act. It is no hardship to the employer to disallow him a defense based on an agreement that he should violate a specific statutory duty. His sure protection lies in obedience to the law. The risks that still inhere in the business after this is done may be assumed by the employee. This is not the only instance in which the court has found a legislative limitation upon the right of contract, though not declared in terms. A contract by which a debtor undertakes in advance of judgment not to take a stay of execution or to claim exemption is held to be void, although the statute does not expressly forbid the making of such a contract. Maloney v. Newton, 85 Ind. 565, 44 Am. Rep. 46. The lawmakers, in effect, said that it is contrary to public policy to allow a debtor to be stripped to nakedness. The state in many ways is interested in the debtor's being a self-respecting and self-sustaining citizen. Therefore the debtor is not permitted to barter away the state's interest in him. And though, after judgment, he is not compelled to take a stay or claim his exemption,

the legislature deemed that the public policy would be amply enforced by his privilege to do so. Other examples of this kind might be cited. The conclusion that the employer may not put upon the employee the risks that arise from the employer's disregard of specific statutory requirements is supported by the following authorities: Narramore v. Railroad Co., 96 Fed. 298, 37 C. C. A. 499, 48 L. R. A. 68; Durant v. Mining Co., 97 Mo. 62, 10 S. W. 484; Greenlee v. Railway Co., 122 N. C. 977, 30 S. E. 115, 41 L. R. A. 399, 65 Am. St. Rep. 734; Baddeley v. Earl Granville [1887] 19 Q. B. Div. 423, 17 Eng. Ruling Cas. 212; Groves v. Wimborne [1898] 2 Q. B. 402; Curran v. Railway Co., 25 Ont. App. 407.

Second. As to contributory negligence: The complaint alleged that appellee used due care and caution to avoid injury. This is enough, unless the specific averments show this general allegation to be untrue. It sufficiently appears that appellee was an experienced miner, knew that appellant had failed to provide supports as required by statute, and with this knowledge continued at his work until injured. Appellant claims that this constituted such negligence as to preclude a recovery. Counsel are confusing the doctrines of contributory negligence and assumption of risk. Assumption of risk is a matter of contract. Contributory negligence is a question of conduct. If appellee were to be defeated by the rule of assumed risk, it would be because he agreed, long before the accident happened, that he would assume the very risk from which his injury arose. If appellee were to be defeated by the rule of contributory negligence, it would be because his conduct, at the time of the accident and under all of the attendant circumstances, fell short of ordinary care. If the one circumstance of the employee's knowledge of the employer's failure to provide the statutory safeguards were held, as a matter of law, always to overcome the other circumstances characterizing the employee's conduct at the time of the accident, assumption of risk would be successfully masquerading in the guise of contributory negligence. If assumption of risk is the issue, knowledge of defective conditions and acquiescence therein are fatal. If contributory negligence is the issue, knowledge of defective conditions and acquiescence therein may be fatal, may be not; depending upon whether a person of ordinary prudence, under all the circumstances, would have done what the injured person did. If the risk is so great and immediately threatening that a person of ordinary prudence, under all

the circumstances, would not take it, contributory negligence is established. If the risk is not so great and immediately threatening but that a person of ordinary prudence, under all the circumstances, would take it, contributory negligence is not established. Appellee alleges that there was nothing in the appearance of the mine's roof to indicate immediate danger, that he was unable to find any defect therein by the usual tests, and that he could and would have propped up the slate securely if appellant had not been derelict in supplying timbers. The specific averments do not overcome the general allegation of freedom from fault. * * * *

Judgment affirmed.

CHOCTAW, OKLAHOMA, ETC. R. R. CO. v. McDADE.

(191 U. S. 64; 24 Sup. Ct. 24.—1903.)

Mr. Justice DAY delivered the opinion of the court.

This was an action to recover for the death, by wrongful act, of John I. McDade, an employee of the Choctaw, Oklahoma and Gulf Railroad Company. The plaintiff recovered a judgment in the Circuit Court, which was affirmed in the Court of Appeals. 112 Fed. Rep. 888.

There was evidence tending to show that McDade, a brakeman in the employ of the company, was killed on the night of August 19, 1900, while engaged in the discharge of his duties as head brakeman on a car in one of the company's trains. McDade was at his post of duty and when last seen was transmitting a signal from the conductor to the engineer to run past the station of Goodwin, Arkansas, which the train was then approaching. The train passed Goodwin at a rate of from twenty to twenty-five miles an hour. At Goodwin there was a water tank, having attached thereto an iron spout, which, when not in use, hung at an angle from the side of the tank. Shortly after passing Goodwin, McDade was missed from the train, and upon search being instituted, his lantern was found near the place on the car where he was at the time of giving the signal. His body was found at a distance of about six hundred and seventy-five feet beyond the Goodwin tank. There was also testimony tending to show, from the location of the water-

spout and the injuries upon the head and person of McDade, that he was killed as a result of being struck by the overhanging spout. The car upon which McDade was engaged at the time of the injury was a furniture car, wider and higher than the average car, and of such size as to make it highly dangerous to be on top of it at the place it was necessary to be when giving signals, in view of the fact that the spout cleared the car by less than the height of a man above the car when in position to perform the duties required of him. * * * *

We agree with the Circuit Court of Appeals in affirming the instructions upon this subject given by Judge HAMMOND to the jury, in which he said: "It is so simple a task, one so devoid of all exigencies of expense, necessity or convenience, so free of any consideration of skill, except that of the foot rule, and so entirely destitute of any element of choice or selection, that not to make such a construction safe for the brakemen on the trains is a conviction of negligence."

It is the duty of a railroad company to use due care to provide a reasonably safe place and safe appliances for the use of workmen in its employ. It is obliged to use ordinary care to provide properly constructed roadbed, structures and track to be used in the operation of the road. Union Pacific Ry. Co. v. O'Brien, 161 U. S. 451. The spout might readily have been so constructed and hung as to be safe. As it was maintained it was a constant menace to the lives and limbs of employees whose duties required them, by night and day, to pass the structure. It is a case where the dangerous structure is not justified by the necessity of the situation, and we agree with the judgments in the courts below that its maintenance under the circumstances was negligence upon the part of the railroad company. The court, having left to the jury to find the fact as to whether McDade was killed by the obstruction, did not err in giving instruction that the negligent manner in which the waterspout was maintained was, of itself, a conviction of negligence.

The court left to the jury the question of the assumption of risk upon the part of McDade with instructions which did not permit of recovery if he either knew of the danger of collision with the waterspout, or, by the observance of ordinary care upon his part, ought to have known of it. The servant assumes the risk of dangers incident to the business of the master, but not of the latter's negligence. Hough v. Railway Co., 100 U. S. 213; Wabash Ry.

Co. v. McDaniels, 107 U. S. 454; N. P. R. R. Co. v. Herbert, 116 U. S. 642; N. P. R. R. Co. v. Babcock, 154 U. S. 190. The question of assumption of risk is quite apart from that of contributory negligence. The servant has the right to assume that the master has used due diligence to provide suitable appliances in the operation of his business, and he does not assume the risk of the employer's negligence in performing such duties. The employee is not obliged to pass judgment upon the employer's methods of transacting his business, but may assume that reasonable care will be used in furnishing the appliances necessary for its operation. This rule is subject to the exception that where a defect is known to the employee, or is so patent as to be readily observed by him, he cannot continue to use the defective apparatus in the face of knowledge and without objection, without assuming the hazard incident to such a situation. In other words, if he knows of a defect, or it is so plainly observable that he may be presumed to know of it, and continues in the master's employ without objection, he is taken to have made his election to continue in the employ of the master, notwithstanding the defect, and in such case cannot recover. The charge of the court upon the assumption of risk was more favorable to the plaintiff in error than the law required, as it exonerated the railroad company from fault if, in the exercise of ordinary care, McDade might have discovered the danger. Upon this question the true test is not in the exercise of care to discover dangers, but whether the defect is known or plainly observable by the employee. Texas & Pacific Ry. Co. v. Archibald, 170 U. S. 665.

There was testimony tending to show that McDade had been over the part of the road where the Goodwin tank was situated only a few times, and that part of the trips were made in the night season, and also that the furniture cars were of unusual height as compared with those generally used in the transaction of the business of the company. Neither the assumption of risk nor the contributory negligence of the plaintiff below was so plainly evident as to require the jury to be instructed to find against the plaintiff, but, under the facts disclosed, these matters were properly left to the determination of the jury.

We find no error in the judgment of the Circuit Court of Appeals, and it is affirmed.[1]

[1] In Drake v. Auburn City Ry. 178 N. Y. 466, 66 N. E. 121 (1903), the court said: "In the case before us no difficulty is presented; the intestate, when

§ 9.—PLAINTIFF A WRONGDOER.

WHITE v. LANG.

(128 Mass. 598.—1880.)

Tort, under the Gen. Sts. c. 88, sec. 59, to recover double the amount of damage alleged to have been caused by the defendant's dog. Answer, a general denial.

At the trial in the Superior Court before PITMAN, J., without a jury, it appeared that the plaintiff, on Sunday, April 8, 1877, was driving his horse and buggy along a public highway in the city of Boston; that, while so driving, the defendant's dog jumped at the plaintiff's horse and frightened him so that he became unmanageable, ran and overturned the buggy, whereby the same and other property of the plaintiff was damaged; and that, before the accident, the defendant knew of no mischievous or vicious propensity in the dog to attack or harass persons or animals.

The defendant offered evidence to show that the plaintiff was unlawfully traveling on the Lord's day, and not from necessity or charity; but the judge ruled that these facts would constitute no defense, or prevent the plaintiff from recovering; and found for the plaintiff in double the amount of damages sustained by him. The defendant alleged exceptions.

MORTON, J. We must assume, for the purposes of this case, that the plaintiff was unlawfully traveling on the Lord's day. But this fact does not defeat his right to recover, unless his unlawful act was a contributory cause of the injury he sustained. McGrath v. Mervin, 112 Mass. 467; Marble v. Ross, 124 Mass. 44, and cases cited. It has been held in this commonwealth that if a person,

passing over this road frequently, was fully advised as to the proximity of the trees, and if, in his opinion, there was peril in operating an open car, it was his duty to have retired from the employment; as he failed to do this, it must be held that he assumed whatever risk there was in the situation. (Gibson v. Erie Railway Co., 63 N. Y. 449; De Forest v. Jewett, 88 N. Y. 264; Sweeney v. Berlin & Jones Envelope Co., 101 N. Y. 520; Appel v. Buffalo, N. Y. & P. Railway Co., 111 N. Y. 550; Williams v. Del., L. & W. R. R. Co., 116 N. Y. 628; Crown v. Orr, 140 N. Y. 450; Kennedy v. Manhattan Ry. Co., 145 N. Y. 288; Maltbie v. Belden, 167 N. Y. 307, 312.) The rule of the assumption of obvious risks does not rest wholly upon the implied agreement of the employee, but on an independent act of waiver, evidenced by his continuing in the employment with a full knowledge of all the facts."

who is unlawfully traveling on the Lord's day, is injured by a defect in the highway, or by a collision with a vehicle of another traveler, he cannot recover for the injury. This is upon the ground that his illegal act aids in producing the injury, or, in other words, is a contributory cause. Lyons v. Desotelle, 124 Mass. 387; Connolly v. Boston, 117 Mass. 64.

On the other hand, it has been held in several cases that if a person, who is at the time acting in violation of law, receives an injury caused by the wrongful or negligent act of another, he may recover therefor if his own illegal act was merely a condition, and not a contributory cause of the injury. Marble v. Ross, *ubi supra;* Steele v. Burkhardt, 104 Mass. 59; Kearns v. Sowdan, 104 Mass. 63, n.; Spofford v. Harlow, 3 Allen, 176.

We are of opinion that the case at bar falls within the last named class. If a man while traveling is injured by an assault, the act of traveling cannot in any just sense be said to be a cause of the injury. It is true that, if he were not traveling, he would not have received the injury, but the act of traveling is a condition and not a contributory cause of the injury. The plaintiff when traveling was assaulted and injured by a dog for whose acts the defendant is responsible. Gen. Sts. c. 88, sec. 59; LeForest v. Tolman, 117 Mass. 109; Sherman v. Favour, 1 Allen, 191. The act of traveling had no tendency to produce the assault or the consequent injury; and therefore, though the plaintiff was traveling in violation of law, it does not defeat his right of recovery.

Exceptions overruled.

PLATZ v. CITY OF COHOES.

(89 N. Y. 219.—1882.)

DANFORTH, J. The defendant made an excavation in one of its public streets, and neither removing or leveling the earth taken therefrom, left it in the way. While the respondent was riding with her husband, the carriage in which they were was, without carelessness on the part of either, upset by the pile of earth, and she was injured. That the street was defective through the culpable omission of duty on the part of the defendant is not denied, but the

accident happened on Sunday, and the learned counsel for the appellant claims that it owed no duty to the plaintiff to keep its streets in repair on that day, because it did not appear that she was then traveling "either from necessity or charity," nor for any purpose permitted by the law. It is plain, therefore, that she was violating the statute relating to the "observance of Sunday" (1 R. S. 628, title 8, chap. 20, art. 8, sec. 70), but we do not perceive how that fact relieves the defendant.

It imposed an obligation on the plaintiff to refrain from traveling, and for its violation prescribed a forfeiture of one dollar. It also declares that upon complaint made before a magistrate, and conviction had, that sum might be collected by distress and sale of the goods and chattels of the offender, or if sufficient could not be found, she might be "committed to the common jail for not less than one or more than three days." The statute goes no further, and we are aware of no principle upon which it can be held that the right to maintain an action in respect of special damage resulting from the omission of the defendant to perform a public duty is taken away because the person injured was at the time disobeying a positive law. The courts are required to construe a penal statute strictly, and having before him for judgment, an alleged violation of the Sunday law, Lord MANSFIELD said: "If the act of Parliament gives authority to levy but one penalty, there is an end of the question, for there is no penalty at common law." Crepps v. Durden, 2 Cowper, 640. This was a proceeding to enforce the statute, but in Carroll v. Staten Island R. R. Co., 58 N. Y. 126, 17 Am. Rep. 221, an action by a passenger against a carrier to recover damages for injuries received through its carelessness, this court held that the fact, "that the plaintiff was at the time of the injury traveling contrary to the statute," was no defense to the action. The policy of the statute and its limitations were then considered, and the court refused to add to the penalty imposed by it a forfeiture of the right to indemnity for an injury resulting from the defendant's negligence.

The Sunday law received a similar construction in Phila., Wil. & Balt. R. R. Co. v. Phil. & Havre de Grace Steam Towboat Co., 23 How. U. S. Sup. Ct. Rep. 209, the court holding that the offender, the plaintiff in the action, was liable to the fine or penalty imposed thereby, and nothing more, saying, "We do not feel justified, therefore, on any principles of justice, equity, or of public policy, in

inflicting an additional penalty of $7,000, on the libellants, by way of set-off, because their servants may have been subject to a penalty of twenty shillings each for breach of the statute." To the same effect is Baldwin v. Barney, 12 R. I. 392, 34 Am. Rep. 670.

It may indeed be said that if the plaintiff had obeyed the law, remained at home, and not traveled, the accident would not have happened. That is not enough. The same obedience to the law would have saved the plaintiffs in the cases just cited. It must appear that the disobedience contributed to the accident, or that the statute created a right in the defendant, which it could enforce. But the object of the statute is the promotion of public order, and not the advantage of individuals. The traveler is not declared to be a trespasser upon the street, nor was the defendant appointed to close it against her. In such an action the fault which prevents a recovery is one which directly contributes to the accident; as carelessness in driving, either a vicious or unmanageable horse, or at an improper rate of speed, or without observation of the road, or in an insufficient vehicle, or with a defective harness, or in a state of intoxication, or under some other condition of driver, horse or carriage, which may be seen to have brought about the injury.

It may doubtless be said that if the plaintiff had not traveled, she would not have been injured; and this will apply to nearly every case of collision or personal injury from the negligence or willful act of another. Had the injured party not been present he would not have been hurt. But the act of travel is not one which usually results in injury. It therefore, cannot be regarded as the immediate cause of the accident, and of such only the law takes notice. At common law the act was not unlawful, and the plaintiff was still under its protection, and may resort to it against a wrongdoer by whose act she was injured. This has been held in many cases where the person injured was at the time doing an act prohibited by the city ordinance or general statute (Steele v. Burkhardt, 104 Mass. 59; Welch v. Wesson, 6 Gray, 505; Norris v. Litchfield, 35 N. H. 271), and even violating the law now in question or one similar to it. Carroll v. Staten Island Co. and Phila., Wil. & Balt. R. R. Co. v. Phila. & Havre de Grace Towboat Co. have already been referred to. (See also Schmid v. Humphrey, 48 Iowa, 652, 30 Am. Rep. 414.)

Sutton v. The Town of Wauwatosa, 29 Wis. 21, 9 Am. Rep. 534, is in point, not only in its circumstances but in the relations of the

parties. The plaintiff was driving his cattle to market on Sunday, and they were injured by the breaking down of a defective bridge which the defendant, through negligence, had failed properly to maintain. The Sunday statute was relied upon, but the town was held liable. In this State a municipal corporation is regarded as a legal entity, and responsible for its omission to perform corporate duties, to the same extent as a natural person would be under the same circumstances. Dillon on Municipal Corporations, sec. 778; Bailey v. The Mayor, 3 Hill, 531. The authorities, therefore, which deny to an individual through whose negligence another has been injured immunity from the consequences of his wrong, because the injured person was violating the law in question, apply here. Many of them are referred to in the cases named above and need not again be cited.

There are, as the counsel for the appellant contends, authorities the other way. Decisions by very eminent and learned courts. In Vermont: Johnson v. Town of Irasburgh, 47 Vt. 28, 19 Am. Rep. 111; Holcomb v. Town of Danby, 51 Vt. 428. In Massachusetts: Bosworth v. Swansey, 10 Met. 363; Jones v. Andover, 10 Allen, 18. And immunity is also given by that court, under the same statute, to a railroad corporation through whose negligence the plaintiff was injured. Smith v. Boston & Maine R. R., 120 Mass. 490, 21 Am. Rep. 538. But the decisions already made by us (Merritt v. Earle, 29 N. Y. 115; Wood v. Erie Railway Co., 72 id. 196, 28 Am. Rep. 125; Carroll v. Staten Island R. R. Co., *supra*) are in the contrary direction, and are sustained, we think, by reasons of justice and public policy. In Baldwin v. Barney, *supra*, a question arising under the Sunday laws of Massachusetts came before the court in an action by one injured in that State, while traveling on Sunday, by the reckless driving of one also traveling. On the trial the plaintiff was nonsuited, but on appeal the Massachusetts cases are reviewed and disapproved, and after a very deliberate discussion of the decisions in that and other States the court held that the defendant could not show the illegality of the plaintiff's act as a defense, and the nonsuit was set aside. There will be seen great conflict in decided cases, but the weight of authority seems to favor the conclusion already reached by us. Cooley on Torts, sec. 157; Wharton on Negligence, sec. 331. * * * *

Judgment affirmed.

TURNER v. NORTH CAROLINA RY.

(63 N. C. 522.—1869.)

READE, J. The court in which the plaintiff seeks redress for an alleged injury, is a court of the government of one of the States of the United States. The plaintiff was engaged in a rebellion against the government of the United States, and having for a time absented himself from the service of the Rebellion, he contracted with the defendant to convey him to the field of active operations, that he might report for such service again; and he complains that the defendant was guilty of negligence in transporting him, and that thereby he was damaged; and thereupon he asks that the court will enforce his claim, and help him to redress.

If the Rebellion had been successful and a government had been founded upon that success, it would doubtless have been legitimate for the courts of such government to adjust the rights of those who had been engaged as its agents in establishing the government. But will the court of the government which was attempted to be destroyed, interfere to redress one of the insurgents who was disabled in the very act of hostility to the government whose aid he now seeks? If the defendant, who is alleged to have committed the injury, was a friend of the United States, it would seem to be an ungenerous discrimination to subject him to damages for an act of which his government had the benefit; and if the defendant was a co-rebel with the plaintiff, and they were *in pari delicto,* the government would consult its dignity, and not interfere in their dispute.

But this must be understood to be restricted to acts clearly rebellious, or intimately connected with the Rebellion, and in aid of it; for, very clearly, the present courts will take cognizance of all matters of a civil nature between rebels, not intimately connected with and in aid of the Rebellion. In the view of the courts of the present government, the service in which the plaintiff was engaged was illegal. The act of going to the field of operations was illegal, and the contract of the defendant to aid him by carrying him to the field, was an illegal contract, and upon the supposition that both parties were rebels—the most favorable one for the plaintiff—there can be no recovery upon it. Martin v. McMillan, *ante,* 468.

The objection was properly taken on the plea of the general issue. There is no error.

NOTE. As some misapprehension exists as to the extent of the principle administered by the presiding judge upon the trial of the case below, the Reporter adds that during the same term of Allemance Court, in the case of Ireland v. The N. C. R. R. Company, (being a suit for damages occasioned by the same negligence that injured the plaintiff in the case above,) the plaintiff, who was also shown to be an officer of the Confederate States army, under the instruction of his Honor recovered a verdict for $2,000, the defendant having failed to show that he was then going in order to report to General Johnston; also that at the term, in the case of Clark, Adm'r, etc., v. The Raleigh & Gaston R. R. Company, it was shown that the intestate was an officer of the Confederate States army at home on furlough, and that he was killed by the negligence of officials of the defendant, whilst returning home from a visit of friends. Under the instruction of his Honor, the plaintiff recovered a verdict for $3,000.

All these cases were conducted by the same counsel.[1]

McNEILL v. DURHAM, ETC., RY.

(132 N. C. 510; 44 S. E. 34.–1903.)

CLARK, C. J. This is an action for personal injuries, alleged to be due to defendant's negligence. * * * The plaintiff knew that the defendant had no right to make a contract with him to transport him free an unlimited number of miles for an advertisement which in any aspect would not be the exact rate charged all other passengers.

[1] Wallace v. Cannon, 38 Ga. 199, accord. The author of an immoral book, though it is copyrighted, cannot maintain an action against a pirating publisher, as the law recognizes no property rights in such a production. (Stockdale v. Onwhyn, 5 B. and C. 173; 2 Car. & P. 163; Lawrence v. Smith, Jacob, 471 and cases in note; Cf. Stallings v. Owen, 51 Ill. 92.) "The true view is believed to be, that, where one is seeking the help of the court in doing a wrongful thing, or compensation for having done it, or redress for another's having participated with him in it, or where in any other manner compliance with his prayer would involve an affirmance of his wrong as though it were a right, his suit will be rejected." (Bishop's Non-Contract Law, § 59.) See other authorities cited in Burdick's Law of Torts, pp. 85–88.

He knew that the statute denounced such attempted contract as unlawful and punishable with a fine of "not less than one thousand nor more than five thousand dollars." While the plaintiff was not himself made indictable, as in some States, he knew that the contract was unlawful, and he cannot now come into a court of justice, and ask that the court shall give him compensation for damages sustained by the negligent breach of the contract of safe carriage. That presupposes a lawful contract, and he knew that this was an unlawful contract. He and the defendant are *in pari delicto*, and the court will leave the parties to settle their own controversy over damages for breach of a contract forbidden by law. In Cook v. Railroad, 128 N. C. 333, 38 S. E. 925, a tramp was stealing a ride. He was on the train unlawfully. In Pierce v. Railroad, 124 N. C. 83, 32 S. E. 399, 41 L. R. A. 316, a boy had jumped on a switching train, and was riding thereon, contrary to the town ordinance. The court held that the company was liable in such cases only for any willful or wanton injury inflicted by the employees of the company.

Here the plaintiff was on the train illegally, and against a prohibition more severe than the violation of a town ordinance against the boy, or the stealing of a ride by a tramp. To same purport, Richmond & D. R. Co. v. Burnsed (Miss.), 35 Am. St. Rep. 656, and notes; Hendryx v. R. Co., 45 Kan. 379, 25 Pac. 893, and cases cited. The plaintiff is an educated, reputable gentleman—a member of an honorable profession; but, being on the cars illegally, seeking free transportation, or at least discrimination in rates, contrary to the prohibition of the statute, his rights as against the company are the same as those others who were also riding contrary to law. He neither shows nor avers willful, wanton, or malicious injury, and cannot recover. In State v. Railway, 122 N. C. 1052, 30 S. E. 133, 41 L. R. A. 246, the defendant set up the plea of ignorance of the law, but the court said every one was fixed with knowledge of the law.

The plaintiff has had the additional advantage of the notice given by the construction of the statute in that case. In a subsequent case, State v. Railway, 125 N. C. 670, 34 S. E. 527, the court repeated that free transportation, or reduced rates, except in cases allowed by the statute, "would be an undue preference, forbidden by the statute, equally whether it was given upon a free pass from an official, or by a verbal order, or upon a ticket or mileage book not in truth paid for, but donated by the company. It is the fact

of discrimination, and not the method by which it is done, which constitutes the offense." Subsequent to these decisions, the General Assembly re-enacted these sections as sections 13 and 22, c. 164, pp. 301, 304, Laws 1899, with no substantial change, though some other sections were repealed. The constitutions of eleven States—Alabama, Arkansas, California, Florida, Kentucky, Mississippi, Missouri, New York, Pennsylvania, Washington, and Virginia—prohibit the issuing of free passes or giving reduced rates to any member of the legislature or other officeholder whatever; and some of these constitutions, like the federal statute and our statute, and the statutes of yet other States, as Colorado, Massachusetts, North Dakota, Wisconsin, and others, forbid the issuing of free passes or reduced rates to any one whatever, with exceptions similar to those enumerated in our statute above set out. Indeed, the constitutions of four States—New York, Missouri, California, and the recently adopted constitution of Virginia—make the acceptance by any officeholder whatever of a free pass from a railroad or telegraph company, or other discrimination in his favor, a forfeiture of office. This recital will serve to show the importance and general acceptance of the public policy of equality in treatment by quasi public corporations, whose infringement our statute punishes with a fine "not exceeding five thousand dollars," and whose observance it is the duty of all courts to enforce.

We were cited to many authorities holding ineffectual stipulations upon the back of free passes exempting the common carrier from liability for injuries sustained by the holder thereof. These authorities are conflicting (4 Elliott, R. R. § 1608), and can only be considered when the pass is issued in one of the cases permitted by our statute. They have no application to a case like this, where the contract of free carriage is illegal, and the parties are *in pari delicto.*

This is the first case in which the illegal discrimination is set up by the common carrier, but it so happens that by the lapse of time it is now protected from indictment by the statute of limitations.

In refusing to grant judgment as of nonsuit, there was error.

§ 10. REMOTENESS OF DAMAGE.

BOSCH v. THE B. & M. RY. CO.

(44 Iowa, 402.—1876.)

Plaintiffs alleged that they were the owners of certain lots in the city of Burlington upon which they had erected valuable buildings; that a public street lay between these lots and the river and contiguous to the latter; that defendant filled up a portion of the river with deposits of earth, increasing the distance of plaintiff's property therefrom nearly 800 feet, and occupied it with tracks, yards and buildings; that by reason of this change and use of the embankment by the defendants the fire department of the city was unable to gain access to the river and to extinguish a fire that had accidentally broken out in plaintiff's building, whereby it was destroyed. Damages were claimed for the value of the buildings, amounting to over $22,000.

Demurrer to the petition was sustained and plaintiffs appealed.

ROTHROCK, J. Aware as we are of the difficulty in many cases in determining whether damages claimed should be regarded as proximate or remote, yet we are united in the opinion that the court below correctly determined that no recovery can be had upon the allegations in this petition, for the reason that the damages are not the direct and proximate result of the wrongs complained of, but are too remote. In the case of Insurance Company v. Friend, 7 Wallace, 49, it is said: "We have had cited to us a general review of the doctrine of proximate and remote causes as it has arisen and has been decided in the courts in a great variety of cases. It would be an unprofitable labor to enter into an examination of these cases. If we could deduce from them the best possible expression of the rule, it would remain after all to decide each case largely upon the special facts belonging to it, and often upon the very nicest discriminations."

We do not regard the facts of this case as an approach to the dividing line where distinctions become shadowy and discriminations difficult to be made. If any damages were recoverable for the obstruction of the streets by an improper construction of defendant's

road, thus depriving plaintiffs of convenient access to the river, they were recoverable by reason of the obstruction of the streets, and simply because the streets were obstructed, and not by reason of a fire, which could not be extinguished because the defendant occupied and used the streets for a railroad.

We have examined the cases cited by counsel for appellants, and although they are ingeniously presented, yet the facts in this case are so widely different from any of them that we cannot regard them as applicable. The nearest approach to this case is that of the Metallic Compression Co. v. Fitchburg Railroad Company, 109 Mass. 277. In that case the facts were that plaintiff's manufacturing establishments, situated about fifty feet from defendant's railroad track, were on fire. Two fire engines were brought on the ground, the hose was laid across the railroad track to a hydrant, and water was being thrown on the fire, which was being diminished. A freight train approached, and although warned in time, the employees of defendant negligently ran across the hose severing it, and stopping the supply of water, and the building was burned. The defendant was held liable.

We suppose without question that if one should in any manner, by cutting the hose, disabling the engine, or the like, stop the stream of water, by reason of which act property is destroyed, he would be liable, because the damages are the direct and proximate result of his act. But in the case at bar the building of the railroad tracks and depots, the widening and filling the streets, have no connection with the fire, nor with the hose or other apparatus of the fire companies. They are independent acts, and their influence in the destruction of plaintiff's property is too remote to be made the basis of recovery.

Affirmed.

WILLIS v. ARMSTRONG COUNTY.

(183 Pa. 184; 38 At. 621.—1897.)

Action by Elizabeth Willis against the county of Armstrong to recover for personal injuries alleged to have resulted from defendant's neglect to erect guard rails at the edge of an embankment at one end of its bridge. The court refused to take off a compulsory nonsuit, and plaintiff appeals.

PER CURIAM. It clearly appears from the evidence that the absence of guard rails was not the proximate cause of the accident which befell the plaintiff without any fault on her part. The undisputed evidence is that after the wagon, in which plaintiff and several others were riding had safely passed over the bridge, and proceeded up the hill fifty or sixty feet, the eyes in two of the traces gave way, and this resulted in freeing the horses from the wagon, and from the control of the driver. Being thus situated, the wagon ran back, down the grade, and, missing the bridge, went over the embankment, into the stream below. If the traces by which the wagon was drawn had not broken, the accident would not have occurred. Viewing the testimony in its most favorable light for the plaintiff, there is nothing in it to justify a verdict against the defendant. At most, the absence of guard rails was merely the remote cause of her injury. The sole efficient and proximate cause was the breaking of the harness, in consequence of which the control of the wagon was lost. The learned trial judge rightly refused to take off the judgment of nonsuit.

Judgment affirmed.[1]

[1] In Bentley v. Fisher Lumber, etc., Co. 51 La. Ann. 451, 25 So. 262, (1899), the court said: "The claim for damages in respect to the land below or south of the levee encounters the difficulty that the inundation causing the alleged loss of crops was the result of the act of the mob cutting the levee. In this view, it was not the levee that caused the damage; for, while the levee stood, there could be no flooding of the land. Can the defendants be held for the violence of the mob that precipitated the water on the land? The law is clear that in suits of this character, in computing actual damages, the proximate cause is that which the law regards. When the law awards other damages than those attributable to the proximate cause, they are given as punitory. Sedg. Meas. Dam. § 58 et seq.; 2 Greenl. Ev. § 256. We have given attention to the line of authority cited by plaintiff to connect the act of the defendant in building the levee with the subsequent violence of the mob cutting it. The "Squib Case" is found in the text-books to illustrate the rule that distinguishes the remote from the proximate cause. The squib is thrown in the market house, lights on one stall, then on another, from both of which it is thrown, and finally the squib thus thrown from the last stall enters the plaintiff's eye and destroys his sight. The court attributed the plaintiff's injury to the party who first threw the squib. In other words his act was deemed the proximate cause of the loss. The text-books call attention to the concurrence to the full extent of the decision of but one of the four judges, and to the dissent of Justice Blackstone. Sedg. Meas. Dam. p. 58 note. This type of cases, cited in support of plaintiff's demand, does not, in our view, support it. The hurling of the squib in the case cited (the wrongful act) is the effective and direct cause of the loss of the plaintiff's eye. In the case

STONE v. BOSTON & A. R. CO.

(171 Mass. 536; 51 N. E. 1.—1898.)

ALLEN, J. This is an action of tort to recover for the loss of the plaintiff's buildings and other property by fire, under the following circumstances: The defendant owned and operated a branch railroad extending from its main line at South Spencer to the village of Spencer, and had at the Spencer terminus a passenger station, a freight house, and a freight yard, all adjoining a public street. On the side of the freight house, and extending beyond it about seventy-five feet, was a wooden platform about eight feet wide and four feet high, placed upon posts set in the ground, the underside being left open and exposed. The main tracks ran along on the front side of this platform and freight house, and on the rear of the platform there was a freight track, so near as to be convenient to load and unload cars from and upon it. The plaintiff was engaged in the lumber business, buying at wholesale and selling at wholesale and retail, manufacturing boxes, etc. His place of business comprised several buildings, some of which were across the street from the defendant's buildings, and his principal buildings were about seventy-five feet from the point on the defendant's premises, beneath the platform, where the fire originated.

The evidence tended to show that the platform was mostly used for the storing of oil which had been brought upon the railroad, until it was taken away by the consignees; and that the platform had become thoroughly saturated with oil, which had leaked from the barrels, and which not only saturated the platform, but dripped to the ground beneath. More or less rubbish accumulated from time to time under the platform, and was occasionally carried away. The evidence tended to show that this space below had been cleaned out two or three weeks before the fire. On the day of the fire, September 13, 1893, from twenty-five to thirty barrels of oil and oil

before us the levee built by defendant was harmless, in respect to plaintiff's loss. The act of the mob was the direct cause of that loss. Our law, and the general law in this class of cases, restrict damages, unless given by way of punishment, to the loss arising from the proximate cause. Gaulden v. McPhaul, 4 La. Ann. 79; Grant v. McDonough, 7 La. Ann. 448. With the most patient consideration on this part of the case, we reach the conclusion of our learned brother of the district court, that the plaintiff's demand in this respect cannot be sustained."

barrels were upon the platform. Some were nearly or quite empty, some were partly full, but the most of them were probably full or nearly full.

The only evidence to show how the fire originated tended to prove that one Casserly, a teamster, brought a load of boots to be shipped upon a car which was standing upon the track on the rear side of the platform; that he was smoking a pipe; that he stepped into the car, to wait for the defendant's foreman of the yard, who was to help him unload the boots; that, in stepping in, he stubbed his toe, and knocked some of the ashes and tobacco out of his pipe; that he relighted the pipe with a match, and threw the match down; that at this time he was standing in the door of the car, facing the platform. It must be assumed upon the evidence that the fire caught upon the ground underneath the platform from the match thrown down by Casserly. All efforts to extinguish the fire failed. It spread fast, and was almost immediately upon the top of the platform,—running up a post, according to one of the witnesses, and very soon it reached the barrels of oil, which began to explode, and the fire communicated to the plaintiff's buildings, and they were burned. There was evidence tending to show that all of the oil had been upon the platform for a longer time than forty-eight hours. According to the testimony of the plaintiff, the platform was never, to his knowledge, empty of oil or oil barrels. It was completely saturated with oil, and that general condition of things, so far as the platform was concerned, had existed for eight years,—ever since he himself had been there. Upon the evidence introduced by the plaintiff, the court directed a verdict for the defendant.

The plaintiff, in substance, contends before us that the defendant was negligent in storing oil upon the platform, taking into consideration the condition of the platform, and of the ground and material under it, and the length of time during which the oil had been allowed to remain there; that, irrespectively of the question of negligence, the platform with the oil upon it constituted a public nuisance, especially in view of Pub. St. c. 102, § 74, providing that the oil composed wholly or in part of any of the products of petroleum shall not be allowed to remain on the grounds of a railroad corporation in a town for a longer time than forty-eight hours without a special permit from the selectmen; that the defendant is responsible for the damage resulting from the public nuisance, whether the act of starting the fire was due to a third person or not;

and that the question should have been submitted to the jury whether the damage to the plaintiff's property was the natural and proximate consequence of the defendant's tort.

Upon the evidence, the supposed tort of the defendant, whether it be called "negligence" or "nuisance," appears to have been limited to the keeping of oil too long upon the platform. Assuming this oil to have been a product of petroleum, and so within the statute cited, nevertheless the defendant, as a common carrier, was bound to transport it and deliver it to the consignees. The oil, as is well known, was an article of commerce, and in extensive use, and the defendant was bound to transport it, and keep it for a reasonable time, after its arrival in Spencer, in readiness for delivery. There was no evidence that the oil was liable to spontaneous ignition, or that the platform was an unsuitable place for its temporary storage till it could be removed, or that the defendant could have prevented the escape of oil upon the platform from leaky barrels. But we may assume without discussion that the defendant was in fault in keeping the oil there so long, and that, if the oil had been removed within forty-eight hours after its arrival, the fire would probably not have been attended with such disastrous consequences.

Nevertheless, the question remains—and, in our view, this becomes the important and decisive question of the case—whether, assuming that the defendant was thus in fault, the plaintiff introduced any evidence which would warrant any finding by the jury that the damage to his property was a consequence for which the defendant is responsible; or, in other words, whether the act of Casserly in starting the fire was such a consequence of the defendant's original wrong in allowing the oil to remain upon the platform that the defendant is responsible to the plaintiff for it. In approaching this question, it must be borne in mind that Casserly was in no sense a servant, agent, or guest of the defendant. He brought a load of goods to the defendant's station, to be carried upon the defendant's railroad. The defendant was bound by law to accept and carry them. It could not lawfully exclude Casserly from its ground. By Pub. St. c. 112, § 188, it was bound to give all persons reasonable and equal terms, facilities, and accommodations for the transportation of merchandise upon its railroad, and for the use of its depot and other buildings and ground. Casserly came there in his own right, and the defendant is not responsible for him in the same way that perhaps it might be responsible for a servant, agent,

or (according to some statements of the law) guest. Lothrop v. Thayer, 138 Mass. 466. It is also to be borne in mind that this was not a case of spontaneous ignition of a substance liable to ignite spontaneously, as was the case in Vaughan v. Menlove, 3 Bing. N. C. 468. Nor did the defendant owe to the plaintiff the duties of a carrier of passengers or freight towards its customers, or any other duties growing out of a contract with the plaintiff. There was no contract of any kind between the plaintiff and the defendant.

The rule is very often stated that, in law, the proximate, and not the remote, cause is to be regarded; and, in applying this rule, it is sometimes said that the law will not look back from the injurious consequence beyond the last sufficient cause, and especially that, where an intelligent and responsible human being has intervened between the original cause and the resulting damage, the law will not look back beyond him. This ground of exonerating an original wrongdoer may be found discussed or suggested in the following decisions and text-books, among others: Clifford v. Cotton Mills, 146 Mass. 47, 15 N. E. 84; Elmer v. Fessenden, 151 Mass. 359, 24 N. E. 208; Hayes v. Inhabitants of Hyde Park, 153 Mass. 514, 27 N. E. 522; Freeman v. Accident Ass'n, 156 Mass. 351, 30 N. E. 1013; Lynn Gas & Electric Co. v. Meriden Fire Ins. Co., 158 Mass. 570, 33 N. E. 690; Insurance Co. v. Tweed, 7 Wall. 44; Railroad Co. v. Kellogg, 94 U. S. 469; Railroad Co. v. Hickey, 166 U. S. 521, 17 Sup. Ct. 661; Reiper v. Nichols, 31 Hun, 491; Read v. Nichols, 118 N. Y. 224 N. Y. 23 N. E. 468; Mars v. President, etc., 54 Hun, 625, 8 N. Y. Supp. 107; Leavitt v. Railroad Co. (Me.) 36 Atl. 998; Cuff v. Railroad Co., 35 N. J. Law, 17; Curtin v. Somerset, 140 Pa. St. 70, 21 Atl. 244; Railroad Co. v. Salmon, 59 N. J. Law, 299; Pennsylvania Co. v. Whitlock, 99 Ind. 16; Goodlander Mill Co. v. Standard Oil Co., 11 C. C. A. 253, 63 Fed. 400, 405; Shear. & R. Neg. §§ 38, 666; Whart. Neg. § 134 *et seq.*

It cannot, however, be considered that in all cases the intervention even of a responsible and intelligent human being will absolutely exonerate a preceding wrongdoer. Many instances to the contrary have occurred, and these are usually cases where it has been found that it was the duty of the original wrongdoer to anticipate and provide against such intervention, because such intervention was a thing likely to happen in the ordinary course of events. Such was the case of Lane v. Atlantic Works, 111 Mass. 136, where it was found by the jury that the meddling of young boys with a loaded

truck left in a public street was an act which the defendants ought to have apprehended and provided against, and the verdict for the plaintiff was allowed to stand. In the carefully expressed opinion by Mr. Justice COLT the court say: "In actions of this description the defendant is liable for the natural and probable consequences of his negligent act or omission. The injury must be the direct result of the misconduct charged; but it will not be considered too remote if, according to the usual experience of mankind, the result ought to have been apprehended. The act of a third person, intervening or contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrongdoer, if such act ought to have been foreseen. The original negligence still remains a culpable and direct cause of the injury. The test is to be found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise." According to this statement of the law, the questions in the present case are: Was the starting of the fire by Casserly the natural and probable consequence of the defendant's negligent act in leaving the oil upon the platform? According to the usual experience of mankind, ought this result to have been apprehended? The question is not whether it was a possible consequence, but whether it was probable, that is, likely to occur, according to the usual experience of mankind. That this is the true test of responsibility, applicable to a case like this, has been held in very many cases, according to which a wrongdoer is not responsible for a consequence which is merely possible, according to occasional experience, but only for a consequence which is probable, according to ordinary and usual experience. One is bound to anticipate and provide against what usually happens and what is likely to happen; but it would impose too heavy a responsibility to hold him bound in like manner to guard against what is unusual and unlikely to happen, or what, as it is sometimes said, is only remotely and slightly probable. A high degree of caution might, and perhaps would, guard against injurious consequences which are merely possible; but it is not negligence, in a legal sense, to omit to do so. There may not always have been entire consistency in the application of this doctrine; but, in addition to cases of boys meddling with things left in a public street, courts have also held it competent for a jury to find that the injury was probable; although brought about by a new agency, when heavy articles left near an opening in the floor of an unfinished building,

or on the deck of a vessel, were accidentally jostled so that they fell upon persons below. McCauley v. Norcross, 155 Mass. 584, 30 N. E. 464; The Joseph B. Thomas, 81 Fed. 578; when sheep, allowed to escape from a pasture, and stray away in a region frequented by bears, were killed by the bears, Gilman v. Noyes, 57 N. H. 627; and when a candle or match was lighted by a person in search of a gas leak, with a view to stop the escape of gas; Koelsch v. Philadelphia Co., 152 Pa. St. 355, 25 Atl. 522; and in other cases not necessary to be specially referred to. In all of these cases the real ground of decision has been that the result was or might be found to be probable, according to common experience.

Without dwelling upon other authorities in detail, we will mention some of those in which substantially this view of the law has been stated: Davidson v. Nichols, 11 Allen, 514; McDonald v. Snelling, 14 Allen, 290; Tutein v. Hurley, 98 Mass. 211; Hoadley v. Transportation Co., 115 Mass. 304; Hill v. Winsor, 118 Mass. 251; Derry v. Flitner, Id. 131; Freeman v. Accident Ass'n, 156 Mass. 351, 30 N. E. 1013; Spade v. Railroad Co., 168 Mass. 285, 47 N. E. 88, and cases there cited; Cosulich v. Oil Co., 122 N. Y. 118, 25 N. E. 259; Rhodes v. Dunbar, 57 Pa. St. 274; Hoag v. Railroad, 85 Pa. St. 293; Behling v. Pipe Lines, 160 Pa. St. 359, 28 Atl. 777; Goodlander Mill Co. v. Standard Oil Co., 11 C. C. A. 253, 63 Fed. 400, 405, 406; Haile's Curator v. Railway Co., 9 C. C. A. 134, 60 Fed. 557; Clark v. Chambers, 3 Q. B. Div. 327; Whart. Neg. (2d Ed.) §§ 74, 76, 78, 138–145, 155, 955; Cooley, Torts, *69, *70; Add. Torts, *40; Pol. Torts, 388; Mayne, Dam. *39, *47, *48. For a recent English case involving a case of remoteness, see Englehart v. Farrant [1897], 1 Q. B. 240.

The rule exempting a slanderer from damages caused by repetition of his words rests on the same ground. Hastings v. Stetson, 126 Mass. 329; Shurtleff v. Parker, 130 Mass. 293; Elmer v. Fessenden, 151 Mass. 359, 24 N. E. 208.

Tried by this test, the defendant is not responsible for the consequences of Casserly's act. There was no close connection between it and the defendant's negligence. There was nothing to show that such a consequence had ever happened before, during the eight years covered by the plaintiff's testimony, or that there were any exciting circumstances which made it probable that it would happen. It was, of course, possible that some careless person might come along, and throw down a lighted match, where a fire would be

started by it. This might, indeed, have happened upon the plaintiff's own premises, or in any other place where inflammable materials were gathered. But it was not according to the usual and ordinary course of events. In failing to anticipate and guard against such an occurrence or accident, the defendant violated no legal duty which it owed to the plaintiff. What qualification, if any, of this doctrine, should be made in case of the storage of high explosives, like gunpowder and dynamite, we do not now consider. See Rudder v. Koopmann (Ala.), 22 South. 601; Kinney v. Koopmann (Ala.), 22 South. 593, and cases there cited; Rhodes v. Dunbar, 57 Pa. St. 274, 290.

The plaintiff, however, contends that this question should have been submitted to the jury. This course would have been necessary if material facts had been in dispute. But where, upon all the evidence, the court is able to see that the resulting injury was not probable, but remote, the plaintiff fails to make out his case, and the court should so rule, the same as in cases where there is no sufficient proof of negligence. McDonald v. Snelling, 14 Allen, 290, 299. In Hobbs v. Railway, L. R. 10 Q. B. 111, 122, BLACKBURN, J., said: "I do not think that the question of remoteness ought ever to be left to a jury. That would be, in effect, to say that there shall be no such rule as to damages being too remote." It is common practice to withdraw cases from the jury on the ground that the damages are too remote. Hammond Co. v. Bussey, 20 Q. B. Div. 79, 89; Read v. Nichols, 118 N. Y. 224, 23 N. E. 468; Cuff v. Railroad Co., 35 N. J. Law, 17; Behling v. Pipe Lines, 160 Pa. St. 359, 28 Atl. 777; Goodlander Mill Co. v. Standard Oil Co., 11 C. C. A. 253, 63 Fed. 400, 405, 406; Pennsylvania Co. v. Whitlock, 99 Ind. 16; Carter v. Towne, 103 Mass. 507; Hoadley v. Transportation Co., 115 Mass. 304; Hutchinson v. Gaslight Co., 122 Mass. 219; Elmer v. Fessenden, 151 Mass. 359, 24 N. E. 208.

The plaintiff further contends that the negligence of the defendant in keeping the oil upon the platform was concurrent with the careless act of Casserly, and that, therefore, it was a case where two wrongdoers, acting at the same time, contributed to the injurious result. But this is not a just view of the matter. The negligence of the defendant preceded that of Casserly, and was an existing fact when he intervened, just as in Lane v. Atlantic Works, 111 Mass. 136, the negligence of the defendants in leaving their loaded truck in the street preceded that of the boys who meddled with it.

The fact, if established, that the defendant's platform, with the oil upon it, constituted a public nuisance, is immaterial, under the circumstances of the present case. If the plaintiff proved a nuisance, he need not go further and show that it was negligently maintained. But we have assumed the existence of negligence on the part of the defendant. Illegality on the part of a defendant does not of itself create a liability for remote consequences, and illegality on the part of a plaintiff does not of itself defeat his right to recover damages. The causal connection between the two still remains to be established. Hanlon v. Railroad, 129 Mass. 310; Hyde Park v. Gay, 120 Mass. 589; Hall v. Ripley, 119 Mass. 135; Damon v. Inhabitants of Scituate, Id. 66; Kidder v. Inhabitants of Dunstable, 11 Gray, 342; Hayes v. Railroad Co., 111 U. S. 228, 241, 4 Sup. Ct. 369. In order to maintain a personal action to recover damages for a public nuisance, the plaintiff must show that his particular loss or damage was caused by the nuisance, just as in case of any other tort. Wesson v. Iron Co., 13 Allen, 101, 103; Stetson v. Faxon, 19 Pick. 147, 154. And, in considering the question of remoteness, it makes no difference what form of wrongdoing the action rests upon. Sherman v. Iron Works Co., 2 Allen, 524; The Notting Hill, 9 Prob. Div. 105, 113; Mayne, Dam. 48, note.

Without considering other grounds urged by the defendant, a majority of the court is of opinion that, upon the evidence, the defendant was not bound, as a matter of legal duty, to anticipate and guard against an act like that of Casserly, he being a stranger coming upon the defendant's premises for his own purposes and in his own right.

Exceptions overruled. KNOWLTON, J., dissenting.

ISHAM v. DOW'S ESTATE.

(70 Vt. 588; 41 At. 585.—1898.)

ROWELL, J. Dow, the intestate, a poor gunner, as he knew, with eyesight much impaired, knowing that the plaintiff and her children were alone in her husband's house, unlawfully, wantonly, and maliciously shot at and wounded her husband's dog, lying peaceably

in close proximity to the house, on the land of a third person, whereupon the dog sprang up, rushed wildly and rapidly towards the house, entered it through an open door into the room where the plaintiff was, ran violently and forcibly against her, knocking her down and injuring her; and the question is whether the estate is liable for it. The defendant says that, in order to recover, the plaintiff must establish two things, namely, negligence on the part of Dow, and that her injury resulted proximately therefrom, and that the case shows neither, as it does not show that Dow owed her any legal duty, nor that his act was the proximate cause of her injury. But we cannot adopt this view.

The intestate unlawfully, wantonly, and maliciously shot at the dog, intending, we will assume, to kill it, but not knowing whether he would or not, and not knowing what would happen if he did not; and by his wanton act the dog was set wildly in motion, and that motion, thus caused, continued, without the intervention of any other agency, and without power on his part to control it, until the plaintiff's injury resulted therefrom. In these circumstances the law treats the act of the intestate as the proximate cause of the injury, whether the injury was, or could have been, foreseen, or not, or was or not the probable consequence of the act; for the necessary relation of cause and effect between the act and the injury is established by the continuous and connected succession of the intervening events. This is the universal rule when the injurious act is wanton. In 16 Am. & Eng. Enc. Law, 430, 434, the true principle is said to be that he who does such an act is liable for all the consequences, however remote, because the act is *quasi* criminal in its character, and the law conclusively presumes that all the consequences were foreseen and intended.

But it is not necessary, in this State, certainly, that the act should be wanton, in order to impose liability for all the injurious consequences. If it is voluntary, and not obligatory, it is enough. In Vincent v. Stonehour, 7 Vt. 66, it is said that for such an act the doer is answerable for any injury that may happen by reason thereof, whether by accident or carelessness. In Wright v. Clark, 50 Vt. 130, the defendant shot at a fox that the plaintiff's dog had driven to cover, and accidentally hit the dog; and he was held liable, because the shooting at the fox was voluntary, and furnished no excuse for hitting the dog, though he did not intend to hit him. The same rule was applied at *nisi prius*, without exception, in Taylor

v. Hayes, 63 Vt. 475, 21 Atl. 610, where the defendant shot at a partridge, and accidentally hit a cow. So, in Bradley v. Andrews, 51 Vt. 530, the defendant voluntarily discharged an explosive missile into a crowd, and hurt the plaintiff; and it was held that, as the act was voluntary and wrongful, the defendant was liable, and that his youth and inexperience did not excuse him. The rule is the same here in negligence cases and may be formulated thus: When negligence is established, it imposes liability for all the injurious consequences that flow therefrom, whatever they are, until the intervention of some diverting force that makes the injury its own, or until the force set in motion by the negligent act has so far spent itself as to be too small for the law's notice. But, in administering this rule, care must be taken to distinguish between what is negligence, and what the liability for its injurious consequences.

On the question of what is negligence, it is material to consider what a prudent man might reasonably have anticipated; but, when negligence is once established, that consideration is entirely immaterial on the question of how far that negligence imposes liability. This is all well shown by Stevens v. Dudley, 56 Vt. 158, and Gilson v. Canal Co., 65 Vt. 213, 26 Atl. 70. The rule is the same in England, as will be seen by referring to the leading case of Smith v. Railway Co., L. R. 6 C. P. 14, in the exchequer chamber. * * * * * * * * * *

Ryan v. Railroad Co., 35 N. Y. 210, is relied on by the defendant. Railroad Co. v. Kerr, 62 Pa. St. 353, is a similar case. It is said in Railroad Co. v. Kellogg, 94 U. S. 474, that these cases have been much criticised; that if they were intended to hold that when a building has been negligently set on fire, and a second building is fired from the first, it is a conclusion of law that the owner of the second has no remedy against the negligent wrongdoer, they have not been accepted as authority for such a doctrine even in the States where they are made, and are in conflict with numerous cases in other jurisdictions. Judge REDFIELD says in 13 Am. Law. Reg. (N. S.) 16, that these cases have not been countenanced by the decisions in other States. And Judge COOLEY says that a different view prevails in England and most of the American States; that the negligent fire is regarded as a unity; that it reaches the last building, as a direct and proximate result of the original negligence, just as a rolling stone put in motion down a hill, injuring several persons in succession, inflicts the last injury as a proximate result of the

original force as directly as it does the first, though, if it had been stopped on the way, and started again by another person, a new cause would thus have intervened, back of which any subsequent injury could not be traced; that proximity of cause has no necessary connection with contiguity of space nor nearness of time. Cooley, Torts (1st Ed.), 76.

Judgment reversed and cause remanded.

MILWAUKEE & C. RY. CO v. KELLOGG.

(94 U. S. 469.—1876.)

STRONG, J. This was an action to recover compensation for the destruction by fire of the plaintiff's sawmill and a quantity of lumber, situated and lying in the State of Iowa, and on the banks of the river Mississippi. That the property was destroyed by fire was uncontroverted. From the bill of exceptions, it appears that the "plaintiff alleged the fire was negligently communicated from the defendants' steamboat 'Jennie Brown' to an elevator built of pine lumber, and one hundred and twenty feet high, owned by the defendants, and standing on the bank of the river, and from the elevator to the plaintiff's sawmill and lumber piles, whilst an unusually strong wind was blowing from the elevator towards the mill and lumber. On the trial, it was admitted that the defendants owned the steamboat and elevator; that the mill was five hundred and thirty-eight feet from the elevator, and that the nearest of plaintiff's piles of lumber was three hundred and eighty-eight distant from it. It was also admitted that there was conflict between the parties plaintiff and defendant respecting the ownership of the land where the mill stood and the lumber was piled, both claiming under a common source of title. The plaintiff had built the mill, and he was in occupation of it, believing he had a right to be there."

* * * * *

A second exception taken in the court below and here insisted upon, is that the court refused to permit the defendants to prove by witnesses who were experts, experienced in the business of fire insurance, and accustomed by their profession to estimating and calculating the hazard and exposures to fire from one building to

another, and to fixing rates of insurance, that, owing to the distance between the elevator and the mill, and the distance between the elevator and the lumber piles, the elevator would not be considered as an exposure to the mill or lumber, and would not be considered in fixing a rate thereon, or in measuring the hazard of mill or lumber.

This exception is quite unsustainable. The subject of proposed inquiry was a matter of common observation, upon which the lay or uneducated mind is capable of forming a judgment. In regard to such matters, experts are not permitted to state their conclusions. In questions of science their opinions are received, for in such questions scientific men have superior knowledge, and generally think alike. Not so in matters of common knowledge. Thus, it has been held that an expert cannot be asked whether the time during which a railroad train stopped was sufficient to enable the passengers to get off, Keller v. Railroad Company, 2 Abb. [N. Y.] App. Dec. 480; or whether it was prudent to blow a whistle at a particular time, Hill v. Railroad Company, 55 Me. 438. Nor can a person conversant with real estate be asked respecting the peculiar liability of unoccupied buildings to fire. Muloy v. Insurance Company, 2 Gray (Mass.) 541. In Durell v. Bederly, Chief Justice GIBBS said, "The opinion of the underwriters on the materiality of facts, and the effect they would have had upon the premium, is not admissible in evidence." Powell's Evid. (4th ed.) 103. And in Campbell v. Richards, 5 Barn. & Ad. 846, Lord DENMAN said: "Witnesses are not receivable to state their views on matters of legal or moral obligation, nor on the manner in which others would probably be influenced, if the parties had acted in one way rather than in another." See also Lord MANSFIELD'S opinion in Carter v. Boehm, 3 Burr. 1905, 1913, 1914, and Norman v. Higgins, 107 Mass. 494, in which it was ruled, that, in an action for kindling a fire on the defendant's land so negligently that it spread to the plaintiff's land and burned his timber, the opinion of a person experienced in clearing land by fire, that there was no probability that a fire set under the circumstances described by the witnesses would have spread to the plaintiff's land, was inadmissible.

The next exception is to the refusal of the court to instruct the jury as requested, that "if they believed the sparks from the 'Jennie Brown' set fire to the elevator through the negligence of the defendants, and the distance of the elevator from the nearest

lumber pile was three hundred and eighty-eight feet, and from the mill five hundred and twenty-eight feet, then the proximate cause of the burning of the mill and lumber was the burning of the elevator, and the injury was too remote from the negligence to afford a ground for recovery." This proposition the court declined to affirm, and in lieu thereof submitted to the jury to find whether the burning of the mill and lumber was the result naturally and reasonably to be expected from the burning of the elevator; whether it was a result which, under the circumstances, would naturally follow from the burning of the elevator; and whether it was the result of the continued effect of the sparks from the steamboat, without the aid of other causes not reasonably to be expected. All this is alleged to have been erroneous. The assignment presents the oft-embarrassing question, what is and what is not the proximate cause of an injury. The point propounded to the court assumed that it was a question of law in this case; and in its support the two cases of Ryan v. The New York Central Railroad Co., 35 N. Y. 210, and Kerr v. Pennsylvania Railroad Co., 62 Penn. St. 353, are relied upon. Those cases have been the subject of much criticism since they were decided; and it may, perhaps, be doubted whether they have always been quite understood. If they were intended to assert the doctrine that when a building has been set on fire through the negligence of a party, and a second building has been fired from the first, it is a conclusion of law that the owner of the second has no recourse to the negligent wrongdoer, they have not been accepted as authority for such a doctrine, even in the States where the decisions were made. Webb v. The Rome, Watertown & Ogdensburg Railroad Co., 49 N. Y. 420, and Pennsylvania Railroad Co. v. Hope, 80 Penn. St. 373. And certainly they are in conflict with numerous other decided cases. Kellogg v. The Chicago & North Western Railroad Co., 26 Wis. 224; Perley v. The Eastern Railroad Co., 98 Mass. 414; Higgins v. Dewey, 107 id. 494; Fent v. The Toledo, Peoria & Warsaw Railroad Co., 59 Ill. 349.

The true rule is, that what is the proximate cause of an injury is ordinarily a question for a jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the

proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market-place. 2 Bl. Rep. 892. The question always is, was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. These circumstances, in a case like the present, are the strength and direction of the wind, the combustible character of the elevator, its great height, and the proximity and combustible nature of the saw-mill and the piles of lumber. Most of these circumstances were ignored in the request for instruction to the jury. Yet it is obvious that the immediate and inseparable consequences of negligently firing the elevator would have been very different if the wind had been less, if the elevator had been a low building constructed of stone, if the season had been wet, or if the lumber and the mill had been less combustible. And the defendants might well have anticipated or regarded the probable consequences of their negligence as much more far-reaching than would have been natural or probable in other circumstances. We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury. Here lies the difficulty. But the inquiry must be answered in accordance with common understanding. In a succession of dependent events an interval may always be seen by an acute mind between a cause and its effect, though it may be so imperceptible as to be overlooked by a

common mind. Thus, if a building be set on fire by negligence, and an adjoining building be destroyed without any negligence of the occupants of the first, no one would doubt that the destruction of the second was due to the negligence that caused the burning of the first. Yet in truth, in a very legitimate sense, the immediate cause of the burning of the second was the burning of the first. The same might be said of the burning of the furniture in the first. Such refinements are too minute for rules of social conduct. In the nature of things, there is in every transaction a succession of events, more or less dependent upon those preceding, and it is in the province of a jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies, and this must be determined in view of the circumstances existing at the time.

If we are not mistaken in these opinions, the Circuit Court was correct in refusing to affirm the defendants' proposition, and in submitting to the jury to find whether the burning of the mill and lumber was a result naturally and reasonably to be expected from the burning of the elevator, under the circumstances, and whether it was the result of the continued influence or effect of the sparks from the boat, without the aid or concurrence of other causes not reasonably to have been expected. The jury found, in substance, that the burning of the mill and lumber was caused by the negligent burning of the elevator, and that it was the unavoidable consequence of that burning. This, in effect, was finding that there was no intervening and independent cause between the negligent conduct of the defendants and the injury to the plaintiff. The judgment must, therefore, be affirmed.

Judgment affirmed.

McDONALD v. SNELLING.

(14 Allen, 290.—1867.)

Defendant's servant was so negligently driving in a public street as to come into collision with a carriage, and thereby caused the horse which was drawing the same to take fright and run away, and to inflict serious injuries upon plaintiff's person and property.

Defendant's demurrer to plaintiff's declaration was overruled and he appealed.

FOSTER, J. The question raised by this demurrer is, whether the injury received by the plaintiff was so remote from the negligent act of the defendant that the action cannot be sustained, although the plaintiff was injured without his own fault, and would not have been injured but for the fault of the defendant. How far at common law is one guilty of negligence responsible in damages for the consequences resulting from his neglect?

If the present action had been brought against a town, under circumstances similar to those disclosed in this declaration, Marble v. Worcester, 4 Gray, 395, would be a decisive authority in favor of the defendant. The liability for damages caused by defects in highways is limited to cases where the defect is the direct and immediate cause of the injury. Jenks v. Wilbraham, 11 Gray, 142. But this statute liability is more narrowly restricted than the rule in actions at common law for damages caused by negligence, in which it is perfectly well settled that the contributory negligence of a third party is no defense, where the defendant has also been guilty of negligence without which the damage would not have been sustained. Eaton v. Boston & Lowell Railroad, 11 Allen, 500. The extent of the defendant's responsibility cannot therefore be conclusively determined by the rule of Marble v. Worcester, because the limits of liability under the statute as to defects in public ways and at common law for negligence are not identical. These cases against towns can be reconciled with the general principles of the law only by the consideration that they depend exclusively on the statute provision, within the terms of which they are strictly confined.

Opinions upon questions of marine insurance are frequently quoted, to illustrate the meaning of the maxim, *causa proxima non remota spectatur*. The exigencies of the present decision do not require an elaborate examination of the doctrine in its application to the law of insurance; but a few observations may be useful. Where the immediate cause of loss is a peril insured against, the underwriters are not exonerated by the fact that its original cause was something not covered by the policy. They are liable if the loss ends in a peril insured against, although it began in some other cause. Thus, a loss arising immediately from a peril of the sea, but remotely from the negligence of the master, is protected by the policy; but it

by no means follows that, in an action brought against the owner or master for such negligence, the consequent loss of the cargo could not be included in the measure of damages. Redman v. Wilson, 14 M. & W. 476. On the contrary, where a master unnecessarily deviated from his voyage, and during the deviation a cargo of lime was wet by a tempest, and the bark was thereby set on fire and consumed, the owner was held liable for the fault of his agent, the master, and the deviation was denied to be sufficiently the proximate cause of the loss of the cargo. Davis v. Garrett, 6 Bing. 716. In a recent insurance cause, one learned judge, WILLES, J., said: "The ordinary rule of assurance law is, that you are to look to the proximate and immediately operating cause, and to that only"; and another, ERLE, C. J., said: "The words are to be construed with reference to the known principle pervading insurance law, *causa proxima non remota spectatur;* the loss must be connected with the supposed cause of it, and in the relation of cause and effect, speaking according to common parlance." Ionides v. Universal Ins. Co., 8 Law Times (N. S.) 705; Marsden v. City and County Ass. Co., Law Rep. 1 C. P. 232. But in an action for damages for refusing to receive a ship into a dock, the rule was said to be "that the damage must be proximate (not immediate) and fairly and reasonably connected with the breach of contract or wrong. As to what is so, different minds will differ." Wilson v. Newport Dock Co., Law Rep. 1 Exch. 186.

Perhaps the truth may be that a maxim couched in terms so general as to be necessarily somewhat indefinite has been indiscriminately applied to different classes of cases in different senses, or at least without exactness and precision; and that is the real explanation of the circumstance that *causa proxima,* in suits for damages at common law, extends to the natural and probable consequences of a breach of contract or tort; while in insurance cases and actions on our highway statute it is limited to the immediately operating cause of the loss or damage. If this be so, the frequent reference to the maxim in cases like the present is not particularly useful, and certainly not conducive either to an accurate statement of principles or to uniform and intelligible results. In insurance causes the maxim is resorted to as furnishing a rule by which to determine whether a loss is attributable to a peril against which the contract has promised indemnity, and its application charges as frequently as it exonerates the underwriter. Peters v. Warren In-

surance Co., 3 Sumner, 389; S. C. 14 Pet. 99; Hillier v. Alleghany County Ins. Co., 3 Penn. State R. 470. The limits of liability and the definition of proximate cause in the law of insurance are too narrow and restricted to be applied to the present case.

Definitions and illustrations drawn from other branches of the law may afford instructive analogies, but for controlling authorities we are to look to adjudications in actions of a similar nature to the present, and arising upon a state of facts more closely resembling those now under consideration. Here the defendant is alleged to have been guilty of culpable negligence. And his liability depends, not upon any contract or statute obligation, but upon the duty of due care which every man owes to the community, expressed in the maxim *sic utere tuo ut alienum non laedas.*

Where a right or duty is created wholly by contract, it can only be enforced between the contracting parties. But where the defendant has violated a duty imposed upon him by the common law, it seems just and reasonable that he should be held liable to every person injured, whose injury is the natural and probable consequence of the misconduct. In our opinion, this is the well-established and ancient doctrine of the common law, and such a liability extends to consequential injuries, by whomsoever sustained, so long as they are of a character likely to follow, and which might reasonably have been anticipated as the natural and probable result under ordinary circumstances of the wrongful act. The damage is not too remote, if, according to the usual experience of mankind, the result was to be expected. This is not an impracticable or unlimited sphere of accountability, extending indefinitely to all possible contingent consequences. An action can be maintained only where there is shown to be: first, a misfeasance or negligence in some particular as to which there was a duty towards the party injured or the community generally; and, secondly, where it is apparent that the harm to the person or property of another which has actually ensued was reasonably likely to ensue from the act or omission complained of.

Two recent cases, both much considered, sound and consistent with each other, well illustrate the true rule of law. A druggist who carelessly labeled belladonna, a deadly poison, as extract of dandelion, a harmless medicine, and sent it so labeled into the market, was held, by the court of appeals in New York, liable in damages, after it had passed through several intervening hands, had been purchased of an apothecary and administered by the plain-

tiff to his wife, who was injured by using it as medicine in consequence of the false label. Thomas v. Winchester, 2 Selden, 397. Here the dealer owed to the public a duty not to expose human life to danger by falsely labeling a noxious drug and selling it in the market as a harmless article. To do so was culpable and actionable negligence towards all likely to be, and who were in fact, injured by the mistake. And the injury that did follow was the natural and easily foreseen result of the carelessness.

On the other hand, where an article, black oxide of manganese, in itself harmless, which became dangerous only by being combined with another, was sold by mistake, the plaintiff, who purchased it of a third party and mixed it with another substance, the combination with which caused a dangerous explosion, was held by this court to have no right of action against the original vendor who made the mistake, for the damages caused by the explosion. Davidson v. Nichols, 11 Allen, 514. The mistake in regard to an article in its own nature ordinarily harmless, in the absence of contract or false representation, was not a violation of any public duty or negligence of such a wrongful and illegal character as to render the party who made it liable for its consequences to third persons. Nor was it a natural and probable consequence of such a mistake that this ordinarily innocuous substance would be mixed with another chemical agent, become explosive by the combination, and a third party be thereby injured.

It is clear from numerous authorities that the mere circumstance that there have intervened, between the wrongful cause and the injurious consequence, acts produced by the volition of animals or of human beings, does not necessarily make the result so remote that no action can be maintained. The test is to be found, not in the number of intervening events or agents, but in their character, and in the natural and probable connection between the wrong done and the injurious consequence. So long as it affirmatively appears that the mischief is attributable to the negligence as a result which might reasonably have been foreseen as probable, the legal liability continues.

There can be no doubt that the negligent management of horses in the public street of a city is so far a culpable act that any person injured thereby is entitled to redress. Whoever drives a horse in a thoroughfare owes the duty of due care to the community, or to all persons whom his negligence may expose to injury. Nor is it open

to question that the master in such a case is responsible for the misconduct of his servant.

Applying these principles more closely to the facts set forth in this declaration and admitted by the demurrer, we find that by careless driving the defendant's sled was caused to strike against the sleigh of one Baker with such violence as to break it in pieces, throwing Baker out, frightening his horse, and causing the animal to escape from the control of its driver and to run violently along Tremont street round a corner, near by, into Eliot street, where he ran over plaintiff and his sleigh, breaking that in pieces and dashing him on the ground. Upon this statement, indisputably the defendant would be liable for the injuries received by Baker and his horse and sleigh. Why is he not also responsible for the mischief done by Baker's horse in its flight? If he had struck that animal with a whip and so made it run away, would he not be liable for an injury like the present? By the fault and direct agency of his servant the defendant started the horse in uncontrollable flight through the streets. As a natural consequence, it was obviously probable that the animal might run over and injure persons traveling in the vicinity. Every one can see plainly that the accident to the plaintiff was one very likely to ensue from the careless act. We are not therefore dealing with the remote or unexpected consequences, not easily foreseen or ordinarily likely to occur, and the plaintiff's case falls clearly within the rule already stated as to the liability of one guilty of negligence for the consequential damages resulting therefrom.

These views are fortified by numerous decisions, to a few of which it may be expedient to refer. It was recently held by this court that when a horse was turned loose on the highway, and there kicked a colt running by the side of its dam, the owner of the horse was liable for that damage. Barnes v. Chapin, 4 Allen, 444. We cannot distinguish between the different ways of letting a horse loose upon the street; whether by leaving him there untied, or leaving a gate open, or, as in the present case, by driving against him, and thus causing him to run away. In Powell v. Deveney, 3 Cush. 300, the defendant's servant left a truck standing beside a sidewalk in a public street, with the shafts shored up by a plank in the usual way. Another truckman temporarily left his loaded truck directly opposite on the other side of the same street, after which a third truckman tried to drive his truck between the two others.

In attempting to do so with due care, he hit the defendant's truck in such a manner as to whirl its shafts round on the sidewalk so that they struck the plaintiff, who was walking by, and broke her leg. For this injury she was allowed to maintain her action, the only fault imputable to the defendant being the careless position in which the truck was left by his servant on the street, which was treated as the sole cause of the breaking of the plaintiff's leg, and in legal contemplation sufficiently proximate to render the defendant responsible. See, also, Powell v. Salisbury, 2 Yo. & Jer. 391; Vanderburg v. Truax, 4 Denio, 464; Rigby v. Hewitt, 5 Exch. 240; Greenland v. Chaplin, ib. 245; Morrison v. Davis, 20 Penn. State R. 175; Lynch v. Nurdin, 1 Q. B. 29; Thomas v. Winchester, *ubi supra*, and cases there cited. When a horse strayed on the highway and there viciously and violently kicked a child, the owner was held not liable in the absence of evidence that he knew the animal was in the habit of kicking; because the act was not one which it was in the ordinary course of nature for a horse of common temper and disposition to do. Cox v. Burbidge, 32 Law Journ. (N. S.) C. P. 89. See also Cook v. Waring, ib. Exch. 262. But two years later the same court held a defendant liable who had negligently left insecure a gate which he was bound to repair, in consequence of which his horse strayed into the field of an adjoining proprietor and there kicked another horse; because this was the natural consequence of two horses meeting under such circumstances, and such an injury produced by such an animal was deemed to be the proximate consequence of the defendant's negligence. Lee v. Riley, 34 Law Journ. (N. S.) C. P. 212. See, also, Reed v. Edwards, ib. C. P. 31. In a case where the defendant left on the street, exposed for sale, a machine for crushing oil cake between rollers, into the cogs of which a little child put his fingers while another boy turned the handle, and the fingers were crushed, the court held that the act was too remote; and BRAMWELL, B., said: "The defendant was no more liable than if he had exposed goods colored with a poisonous paint, and the child had sucked them;" but the same Baron added, "further I can see no evidence of negligence in him. If his act in exposing this machine was negligence, will his act in exposing it again be called willfully mischievous? If that could not be said, then it is not negligence for between negligence and willful mischief there is no difference but of degree." Mangan v. Atherton, Law Rep. 1 Exch. 239. This case has no tendency and indicates no in-

tention to overule Dixon v. Bell, 5 M. & S. 198, in which an injury having been received from a loaded gun, Lord ELLENBOROUGH held the owner liable for leaving a dangerous instrument in a state capable of doing mischief, although the mischief was caused by a girl taking it up, pointing it at a child, and snapping the trigger after the priming had been withdrawn.

It may not always be easy to determine whether any particular act of negligence is of such a character as to render the party guilty of it liable to third persons; or whether the ensuing consequences are so far natural and probable as to impose a liability for them in damages. Cases may be put, falling very near the dividing line, and no rule can be laid down in advance, which will determine all with precision. But the difficulty of applying a principle is a poor argument against its validity, unless one more satisfactory can be proposed in its stead. There may be discrepancies and want of uniformity in the application of the principle to the facts of particular cases, but all the authorities cited concur in the support of the doctrines we have stated, and agree as to the rule by which the extent of liability for consequential damages resulting from negligence ought to be determined.

In the opinion of a majority of the court, the demurrer in the present case must be overruled, because on the statements of the declaration, the plaintiff's injury does not appear to be so remote from the negligence of the defendant as to exonerate the latter from liability. When such a question is raised by the pleadings or arises upon agreed or undisputed facts, it is matter of law; but where the evidence is contradictory, or the inferences to be drawn from it are uncertain, the jury must determine by a verdict whether the facts fall within the rule of law to be laid down on the subject. Wilson v. Newport Dock Co., *ubi supra.*

Demurrer overruled.

MEYER v. MILWAUKEE ELECTRIC RY.

(116 Wis. 886; 93 N. W. 6.—1903.)

DODGE, J. * * * 1. Upon the question of liability, it is urged that certain errors were committed in charging the jury as to proximate cause. In submitting the fifth question,—whether the negligence of defendant's servants in starting the car was the proximate cause of the injury,—the court defined proximate cause as follows: "When we speak of the proximate cause of an injury, we mean not only the direct or natural cause of the injury, but also such a cause as a person of ordinary intelligence and prudence might, in the light of the attending circumstances, have reasonably foreseen would produce such an injury. So that, to answer this question in the affirmative, you will have to find two things: First, that the want of ordinary care on the part of the servant or servants of the defendant was the direct and producing cause of the injury, without the existence of which such injury would not have occurred; and, second, that the injury resulting therefrom was such as a person of ordinary intelligence and prudence would, in the light of the surrounding circumstances, have reasonably foreseen as the probable result of such want of care." It cannot be doubted that this instruction is incorrect in several respects. Primarily, it is said that the negligence, in order to be the proximate cause of the injury, must have been the "direct and natural" and the "direct and producing cause, without the existence of which such injury would not have occurred."

It is somewhat surprising that, after all that has been said by this court in recent years upon this subject, correct definitions of this somewhat metaphysical conception of proximate causation in cases of negligence should be evaded by trial courts. It is not essential that the negligence should be the direct cause of the injury. It suffices that it is the natural and probable cause. It is the natural cause when either it acts directly in producing the injury, or sets in motion other causes so producing it and forming a continuous chain in natural sequence down to the injury; thus linking the negligence with the injury by a chain of natural and consequential causation, although the former may be neither the immediate nor the direct cause of the event. But such causation cannot be proximate cause

in law to arouse liability, unless an ordinarily prudent and intelligent person ought, in the exercise of such intelligence, to have foreseen that an injury might probably result from the negligence under like circumstances. Deisenrieter v. Malting Co., 97 Wis. 279, 72 N. W. 735; Dehsoy v. Light Co. 110 Wis. 412, 85 N. W. 973; Seaver v. Town of Union, 113 Wis. 322, 89 N. W. 163.

Again, complaint is made that the jury were told that, in order to answer the question in the affirmative, they must be able to find that a person of ordinary intelligence and prudence could have foreseen that the negligence would produce such an injury. The word "would" is complained of as carrying the idea of necessary foresight by an ordinarily prudent person, while the true idea is better embodied by "ought," "should," or "might naturally" foresee the likelihood of injury from the negligent act. This criticism is perhaps hypercritical, yet if the word "would" naturally conveys the idea of either necessity of foresight or necessity of result, it is more extreme than is authorized by the authorities. The other expressions above suggested are more certainly accurate, and ought to be used.

The further complaint is made that the charge declares the necessity that the ordinarily intelligent and prudent man ought to have foreseen not alone some injury, but such injury as in fact resulted. While the expressions "the injury" and "such injury" appear in many places in our Reports as correctly expressing the idea of proximate causation, this court has recently carefully pointed out that the rule so stated is too stringent; that it suffices to charge a person with liability for a negligent act if some injury to another ought reasonably to have been foreseen as the probable result thereof by the ordinarily intelligent and prudent person under the same circumstances, even though the specific injury might not be so foreseeable Mauch v. City of Hartford, 112 Wis. 40, 60, 87 N. W. 816. It is apparent, however, that all of these imperfections or errors in the instruction are favorable to the appellant. They require the jury, in order to ascribe the injury to its negligence, to go further than the law requires; hence they could not have been prejudicial to the appellant in bringing about the affirmative answer to the fifth question.

It is complained, however, by the appellant, that they became so prejudicial when applied to the seventh question, which inquired whether, if it was found the plaintiff attempted to board the car

while in motion, and before it had come to a stop, he was guilty of negligence proximately contributing to the injury. In the instruction with reference to this question the court merely referred the jury to the definitions already given of proximate cause. If there was error in this respect, however, we cannot consider it, for the appellant reserved no exception. Another reason, also, why such error could not work reversal is that the seventh question and its answer has no place in the verdict, in view of the negation by the jury, in answering the sixth question, of the defendant's theory that the plaintiff did attempt to board the car while in motion. No other negligence is suggested by any of the evidence in the case, nor was there any request for finding by the jury upon any other phase of negligence attributable to plaintiff. * * * *

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§ 11.—NERVOUS SHOCK.

EWING v. PITTSBURGH RY. CO.

(147 Penn. St. 40.—1892.)

PER CURIAM. The wrong of which the plaintiff Eva Ewing complains was a collision of cars upon the railway of the defendant company, in consequence of which the cars "were broken, overturned, and thrown from the track, and fell upon the lot and premises of the plaintiff, and against and upon the dwelling house of plaintiff, and thereby and by reason thereof greatly endangered the life of the said Eva Ewing, then being in said dwelling house, and subjected her to great fright, alarm, fear, and nervous excitement and distress, whereby she then and there became sick and disabled, and continued to be sick and disabled from attending to her usual work and duties, and suffered and continues to suffer great mental and physical pain and anguish, and is thereby permanently weakened and disabled," etc. To this statement the defendant demurred, and the court below entered judgment for the defendant upon said demurrer. This ruling is assigned as error. It is plain from the plaintiff's statement of her case that her only injury proceeded from fright, alarm, fear, and nervous excitement and distress. There was no allegation that she had received any bodily

injury. If mere fright, unaccompanied with bodily injury, is a cause of action, the scope of what are known as "accident cases" will be very greatly enlarged; for in every case of a collision on a railroad the passengers, although they may have sustained no bodily harm, will have a cause of action against the company for the "fright" to which they have been subjected. This is a step beyond any decision of any legal tribunal of which we have knowledge.

Negligence constitutes no cause of action unless it expresses or establishes some breach of duty. Add. Torts, § 1338. What duty did the company owe this plaintiff? It owed her the duty not to injure her person by force or violence; in other words, not to do that which, if committed by an individual, would amount to an assault upon her person. But it owed her no duty to protect her from fright, nor had it any reason to anticipate that the result of a collision on its road would so operate on the mind of a person who witnessed it, but who sustained no bodily injury thereby, as to produce such nervous excitement and distress as to result in permanent injury; and, if the injury was one not likely to result from the collision, and one which the company could not have reasonably foreseen, then the accident was not the proximate cause. The rule on this subject is as follows: "In determining what is proximate cause, the true rule is that the injury must be the natural and probable consequence of the negligence; such a consequence as, under the surrounding circumstances of the case, might and ought to have been seen by the wrongdoer as likely to flow from his act." Railway Co. v. Taylor, 104 Pa. St. 306; Township of West Mahanoy v. Watson, 112 Pa. St. 574. Tested by this rule, we regard the injury as too remote. We know of no well-considered case in which it has been held that mere fright, when unaccompanied by some injury to the person, has been held actionable. On the contrary, the authorities, so far as they exist, are the other way. Mr. WOOD fairly states the rule in his note to Mayne on Damages at page 74: "So far as I have been able to ascertain, the force of the rule is that the mental suffering referred to is that which grows out of the sense of peril or the mental agony at the time of the happening of the accident, and that which is incident to and blended with the bodily pain incident to the injury, and the apprehension and anxiety thereby induced. In no case has it ever been held that mental anguish alone, unaccompanied by an injury to the person, afforded a ground of action." In Wyman v. Leavitt, 71 Me. 227, a contractor of a railroad was blasting rocks within the right of way of the

road. The blast blew rocks upon the plaintiff's land, and, in addition to the damage to the land, plaintiff claimed damages for fright, caused by apprehension of personal injury. Held, that he could not recover. Our own recent case of Fox v. Borkey, 126 Pa. St. 164, was a case of fright from blasting, and it was said by our Brother MITCHELL: "The injury was not the natural or proximate result of the act complained of." In Lynch v. Knight, 9 H. L. Cas. 577, Lord WENSLEYDALE said: "Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone." To the same point are Railway Co. v. Stables, 62 Ill. 313; Canning v. Williamstown, 1 Cush. 451; Johnson v. Wells, 6 Nev. 224. We need not discuss the authorities cited by the appellant. They are nearly all cases in which the fright was the result of, or accompanied by, a personal injury, and have no application to the case in hand.

Judgment affirmed.

MITCHELL v. ROCHESTER RY. CO.

(151 N. Y. 107; 45 N. E. 354.—1896.)

MARTIN, J. The facts in this case are few, and may be briefly stated. On the 1st day of April, 1891, the plaintiff was standing upon a crosswalk on Main street, in the city of Rochester, awaiting an opportunity to board one of the defendant's cars which had stopped upon the street at that place. While standing there, and just as she was about to step upon the car, a horse car of the defendant came down the street. As the team attached to the car drew near, it turned to the right, and came close to the plaintiff, so that she stood between the horses' heads when they were stopped. She testified that from fright and excitement caused by the approach and proximity of the team she became unconscious, and also that the result was a miscarriage, and consequent illness. Medical testimony was given to the effect that the mental shock which she then received was sufficient to produce that result.

Assuming that the evidence tended to show that the defendant's servant was negligent in the management of the car and horses, and that the plaintiff was free from contributory negligence, the single question presented is whether the plaintiff is entitled to re-

cover for the defendant's negligence which occasioned her fright and alarm, and resulted in the injuries already mentioned. While the authorities are not harmonious upon this question, we think the most reliable and better-considered cases, as well as public policy, fully justify us in holding that the plaintiff cannot recover for injuries occasioned by fright, as there was no immediate personal injury. Lehman v. Railroad Co., 47 Hun, 355; Commissioners v. Coultas, 13 App. Cas. 222; Ewing v. Railway Co., 147 Pa. St. 40, 23 Atl. 340. The learned counsel for the respondent in his brief very properly stated that "the consensus of opinion would seem to be that no recovery can be had for mere fright," as will be readily seen by an examination of the following additional authorities: Haile v. Railroad Co., 60 Fed. 557; Joch v. Dankwardt, 85 Ill. 331; Canning v. Inhabitants of Williamstown, 1 Cush. 451; Telegraph Co. v. Wood, 6 C. C. A. 432, 57 Fed. 471; Renner v. Canfield, 36 Minn. 90, 30 N. W. 435; Allsop v. Allsop, 5 Hurl. & N. 534; Johnson v. Wells, Fargo & Co., 6 Nev. 224; Wyman v. Leavitt, 71 Me. 227.

If it be admitted that no recovery can be had for fright occasioned by the negligence of another, it is somewhat difficult to understand how a defendant would be liable for its consequences. Assuming that fright cannot form the basis of an action, it is obvious that no recovery can be had for injuries resulting therefrom. That the result may be nervous disease, blindness, insanity, or even a miscarriage, in no way changes the principle. These results merely show the degree of fright, or the extent of the damages. The right of action must still depend upon the question whether a recovery may be had for fright. If it can, then an action may be maintained, however slight the injury. If not, then there can be no recovery, no matter how grave or serious the consequences. Therefore the logical result of the respondent's concession would seem to be, not only that no recovery can be had for mere fright, but also that none can be had for injuries which are the direct consequences of it. If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection, and where the damages must rest upon mere conjecture or speculation. The difficulty which often exists in cases of alleged physical injury, in determining whether they exist, and, if so, whether they were caused by the negligent act of the defendant,

would not only be greatly increased, but a wide field would be opened for fictitious or speculative claims. To establish such a doctrine would be contrary to principles of public policy. Moreover, it cannot be properly said that the plaintiff's miscarriage was the proximate result of the defendant's negligence. Proximate damages are such as are the ordinary and natural results of the negligence charged, and those that are usual, and may, therefore, be expected. It is quite obvious that the plaintiff's injuries do not fall within the rule as to proximate damages. The injuries to the plaintiff were plainly the result of an accidental or unusual combination of circumstances, which could not have been reasonably anticipated, and over which the defendant had no control, and hence her damages were too remote to justify a recovery in this action. These considerations lead to the conclusion that no recovery can be had for injuries sustained by fright occasioned by the negligence of another, where there is no immediate personal injury.

The orders of the general and special terms should be reversed, and the order of the trial term granting a nonsuit affirmed, with costs.[1]

SMITH v. POSTAL TEL. CABLE CO.

(174 Mass. 576; 55 N. E. 380.—1899.)

HOLMES, C. J. The point decided in Spade v. Railroad Co., 168 Mass. 285, 47 N. E. 88, 38 L. R. A. 512, and White v. Sander, 168 Mass. 296, 47 N. E. 90, is not put as a logical deduction from the general principles of liability in tort, but as a limitation of those principles upon purely practical grounds. See, further, Spade v. Railroad Co., 172 Mass. 488, 52 N. E. 747, and Silsbee v. Webber,

[1] In Gillespie v. Brooklyn Heights Ry. 178 N. Y. 347, 70 N. E. 857 (1904), Martin J., writing for the majority of the court, declared, that even "where there was no actual assault, but the company has failed in its duty to protect its passenger from insult, abuse, and ill treatment, the plaintiff is entitled to recover damages for the pain and mortification of being publicly denounced as a deadbeat, and that damage may be properly allowed for mental suffering caused by indignity and outrage, whether connected with physical suffering or not; and such damages are compensatory, and not exemplary;" citing with approval Cole v. Atlanta & W. V. Ry. 102 Ga. 474, 31 S. E. 107; Shephard v. Chicago, etc., Ry. 77 Ia. 54, 41, N. W. 564, and other cases.

171 Mass. 378, 380, 381, 50 N. E. 555. If the rule is to be adhered to that there can be no recovery for sickness due to the purely internal operation of fright caused by a negligent act, it cannot be avoided by calling the negligence gross, and alleging that the defendant ought to have known that the result complained of would follow his act. Negligence with reference to a given consequence means that the consequence ought to have been foreseen; and, although the distinction between gross negligence and negligence is known to the law, still, having regard to the grounds for the above-mentioned rule, to allow it to be avoided by such an allegation would be to do away with it. The decisions leave open the question whether, if the harm to the plaintiff was actually foreseen and intended, that would make a difference. It is possible that in some cases motive and actual intent would be more considered in this commonwealth than they would be in England. That question may be left until it arises.

Judgment for defendant.

WATSON v. DILTS.

(116 Ia. 249; 89 N. W. 1068.)

SHERWIN, J. The petition alleges that the plaintiff is a married woman, and that on the 9th day of February, 1900, she resided, with her husband and child, on a farm remote from the traveled highway; that in the nighttime of said day, at about the hour of 11 o'clock, and after she, her husband, and her child had gone to bed, the defendant wrongfully, surreptitiously, and stealthily entered her said home, and went upstairs to the second story thereof, and, as the plaintiff then believed, to commit a felony; that the identity of the defendant was not known to her at the time she heard him enter the house and go upstairs, and that she called to her husband to follow him, which he did; that in her apprehension for her own, her child's, and her husband's life, from what appeared to her a threatened danger, she followed her husband up to the room where the defendant was found, and where she found him and her husband in what appeared to her to be an encounter, and an assault upon her husband; that she became greatly terrified thereat, and was

attacked with a violent nervous chill of such severity that her nervous system completely gave way, and she became prostrated, and was confined to her bed with threatened neurosis, or paralysis, and suffered great mental and physical pain for nearly six weeks, during all of which time she was confined to her bed, and unable to attend to her household duties. The demurrer to the petition is based on the ground that the damages claimed are too remote and speculative, and that the plaintiff seeks recovery for fright and injuries resulting therefrom without any physical injury to her which caused the fright. The petition alleges physical injuries resulting from the fright caused by the defendant, and the demurrer thereto raises the question whether recovery may be had for physical injuries so caused.

Many cases have been before the courts in which the question of a recovery for mental pain alone, and for physical disability produced by fright, unaccompanied by physical impact, have been decided; and the decisions on these questions are in conflict, though it is probably true that the numerical weight of authority denies the right of action. But the cases so holding are not in harmony as to the reasons given for denying the right of action; some of them hold that the injury is not the proximate result of the alleged negligent or wrongful act, while others refuse a recovery for the reason that it is practically impossible to satisfactorily administer any other rule and serve the purposes of justice. The latter rule is the one adopted in Massachusetts. Spade v. Railroad Co., 168 Mass. 285, 47 N. E. 88, 38 L. R. A. 512, 60 Am. St. Rep. 393. We shall not take the time to review the cases in detail which hold to the doctrine that no recovery can be had. A large majority of them are cases in which the simple charge of negligence was made, and in many of them no claim was made for physical disability resulting from the fright. A review of some of the cases will be found in Braun v. Craven, 175 Ill. 401, 51 N. E. 657, 42 L. R. A. 199. See, also, note in Ewing v. Railway Co. (Pa.) 14 L. R. A. 666 (s. c., 23 Atl. 340, 30 Am. St. Rep. 709.)

Our attention has not, however, been called to any case in which the facts averred are precisely parallel to the facts in this case, and in no case to which we have been cited, and in no case which our own investigation has discovered, have we found facts alleged which so strongly condemn the unlimited application of the rule contended for by the appellee as do the facts pleaded in the case at bar. This defendant, in the nighttime, stealthily and unbidden invaded the

home of the plaintiff and her husband and family. When he entered the house and went to an upper room, she did not know who it was, nor his purpose and intent in thus breaking and entering their home. It was an unlawful and lawless trespass on his part, no matter whether he entered with the intent to steal the personal property of the inmates of the house or whether he was in quest of other game. Nor does it matter, in our judgment, that the trespass was committed on property belonging to the husband. It was her home as well as that of her husband; her right to its peaceful and quiet enjoyment day or night was equal to that of her husband; and any unlawful entry or invasion thereof which produced physical injury to her was a wrong for which she ought to recover. Let us go a little further with the case, and suppose that his purpose had been to ransack the house, and steal therefrom; that he went in masked, and with a deadly weapon in his hand. His discovery there under such circumstances might well cause alarm to the boldest man, and, if it produced nervous prostration and physical disability, the theory, no matter what its reason, that would say there was no actionable wrong, would be too fine spun and too cold for our sanction. Nor could it be said, under such circumstances, that the prostration resulting from the fright so caused was not the proximate or probable result of the defendant's act. "Proximate cause is probable cause; and the proximate consequence of a given act or omission, as distinguished from a remote consequence, is one which succeeds naturally in the ordinary course of things, and which, therefore, ought to have been anticipated by the wrongdoer." 1 Thomp. Neg. 156.

It is within the common observation of all that fright may, and usually does, affect the nervous system, which is a distinctive part of the physical system, and controls the health to a very great extent, and that an entirely sound body is never found with a diseased nervous organization, consequently one who voluntarily causes a diseased condition of the latter must anticipate the consequence which follows it. The nerves being, as a matter of fact, a part of the physical system, if they are affected by fright to such an extent as to cause physical pain, it seems to us that the injury resulting therefrom is the direct result of the act producing the fright. Spade v. Railroad Co., 168 Mass. 285, 47 N. E. 88, 38 L. R. A. 512, 60 Am. St. Rep. 393; Hill v. Kimbell (Tex. Sup.) 13 S. W. 59, 7 L. R. A. 618; Mack v. Railroad Co., (S. C.) 29 S. E. 905, 40 L. R. A. 679, 68

Am. St. Rep. 913; Purcell v. Railway Co., 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203; Larson v. Chase, 47 Minn. 307, 50 N. W. 238, 14 L. R. A. 85, 28 Am. St. Rep. 370; Meagher v. Driscoll, 99 Mass. 281, 96 Am. Dec. 759; Lombard v. Lennox, 155 Mass. 70, 28 N. E. 1125, 31 Am. St. Rep. 528; Mentzer v. Telegraph Co., 93 Iowa, 752, 62 N. W. 1, 28 L. R. A. 72, 75, 57 Am. St. Rep. 294.

It is undoubtedly true that the door should not be thrown wide open for trumped-up claims on account of injuries resulting from fright, and we do not intend to so open it in this case. Each case must, of necessity, depend on its own facts. We held in Lee v. City of Burlington (Iowa) 85 N. W. 618, that no recovery could be had for the death of a horse alleged to have been caused by fright, because death therefrom could not be anticipated, and hence it was not the proximate result of the defendant's negligence. In Mahoney v. Dankwort, 108 Iowa, 321, 79 N. W. 134, the question before us was not decided. That case was disposed of on the facts there presented, and was a case of simple negligence. The reasoning of the Massachusetts cases should not be applied to this case, for greater evil would result from a holding of no actionable wrong than can possibly follow the rule we announced. We do not concern ourselves with what the trial of this case may disclose, but hold a cause of action stated in the petition.

The demurrer should therefore have been overruled.

Reversed.

PURCELL v. ST. PAUL CITY RY. CO.

(48 Minn. 184.—1892.)

GILFILLAN, C. J. Appeal from an order overruling a general demurrer to the complaint. From the complaint it appears that the plaintiff was a passenger on one of defendant's cars running upon its line on Jackson street, St. Paul; that, when the car reached the intersection of that line with the defendant's cablecar line running on East Seventh street, the persons in charge of it negligently attempted to cross, and did cross, the cable line in front of a then near and rapidly approaching cable train thereon; that a collision seemed so imminent, and was so nearly caused, that the incident and attending confusion of ringing alarm-bells and

passengers rushing out of the car caused to plaintiff sudden fright and reasonable fear of immediate death or great bodily injury, and that the shock thus caused threw her into violent convulsions, and caused to her, she being then pregnant, a miscarriage, and subsequent illness. The complaint shows a duty on the part of the defendant to exercise the highest degree of care to carry the plaintiff safely. It also shows negligence in respect to that duty, and, if the negligence caused what the law regards as actionable injury, the action is well brought. Of course, negligence without injury gives no right of action.

On the argument there was much discussion of the question whether fright and mental distress alone constitute such injury that the law will allow a recovery for it. The question is not involved in the case. So it may be conceded that any effect of a wrongful act or neglect on the mind alone will not furnish ground of action. Here is a physical injury, as serious, certainly, as would be the breaking of an arm or a leg. Does the complaint show that defendant's negligence was the proximate cause of that injury? If so, the action will, of course, lie. What is in law a proximate cause is well expressed in the definition, often quoted with approval, given in Railroad Co. v. Kellogg, 94 U. S. 469, as follows: "The primary cause may be the proximate cause of a disaster, though it operate through successive instruments; as, an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement; or, as in the oft-cited case of the squib thrown in the market place. Scott v. Shepherd, 2 W. Bl. 892.

"The question always is, was there an unbroken connection between the wrongful act and the injury,—a continuous operation? Did the facts constitute a continuous succession of events so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?" There may be a succession of intermediate causes, each produced by the one preceding and producing the one following it. It must appear that the injury was the natural consequence of the wrongful act or omission. The new, independent, intervening cause must be one not produced by the wrongful act or omission, but independent of it, and adequate to bring about the injurious result. Whether the natural connection of events was maintained, or was broken by such new, independent cause, is generally a question for the jury.

In this case the only cause that can be suggested as intervening between the negligence and the injury is plaintiff's condition of mind, to wit, her fright. Could that be a natural, adequate cause of the nervous convulsions? The mind and body operate reciprocally on each other. Physical injury or illness sometimes causes mental disease, a mental shock or disturbance sometimes causes injury or illness of body, especially of the nervous system. Now, if the fright was the natural consequence of—was brought about, caused by—the circumstances of peril and alarm in which defendant's negligence placed plaintiff, and the fright caused the nervous shock and convulsions and consequent illness, the negligence was the proximate cause of those injuries. That a mental condition or operation on the part of the one injured comes between the negligence and injury does not necessarily break the required sequence of intermediate causes.

If a passenger be placed, by the carrier's negligence, in apparent, imminent peril, and, obeying the natural instinct of self-preservation, endeavors to escape it by leaping from the car or coach, and in doing so is injured, he may, if there be no contributory negligence on his part, recover for the injury, although, had he remained in the car or coach, he would not have been injured. The endeavor to escape is not of itself contributory negligence. Wilson v. Railroad Co., 26 Minn. 278. In such case, though there comes, as an intermediate cause between the negligence and injury, a condition or operation of mind on the part of the injured passenger, the negligence is nevertheless the proximate cause of the injury.

The defendant suggested that plaintiff's pregnancy rendered her more susceptible to groundless alarm, and accounts more naturally and fairly than defendant's negligence for the injurious consequences. Certainly a woman in her condition has as good a right to be carried as any one, and is entitled to at least as high a degree of care on the part of the carrier. It may be that, where a passenger, without the knowledge of the carrier, is sick, feeble, or disabled, the latter does not owe to him a higher degree of care than he owes to passengers generally, and that the carrier would not be liable to him for an injury caused by an act or omission not negligent as to an ordinary passenger. But when the act or omission is negligence as to any and all passengers, well or ill, any one injured by the negligence must be entitled to recover to the full extent of the injury so caused, without regard to whether,

owing to his previous condition of health, he is more or less liable to injury. If the recovery of a passenger in feeble health were to be limited to what he would have been entitled to had he been sound, then, in case of a destruction by fire or wrecking of a railroad car through the negligence of those in charge of it, if all the passengers but one were able to leave it in time to escape injury, and that one could not because sick or lame, he could not recover at all. The suggestion mentioned would, if carried to its logical consequences, lead to such a conclusion.

Order affirmed.

SANDERSON v. NORTHERN PAC. RY.

(88 Minn. 162 ; 92 N. W. 542.—1902.)

START, C. J. The plaintiff A. W. Sanderson on May 7, 1900, with his wife, Caroline Sanderson, and their four children, aged respectively 4, 6, 8, and 12 years, boarded one of the passenger trains of the Omaha Railway at Rice Lake, in the state of Wisconsin, for the purpose of going to St. Paul, and thence over the Northern Pacific Railway to Cedro, in the state of Washington. The father and mother each had a full through ticket, and the child 12 years of age, a boy, had a through half-fare ticket. The tickets were purchased of the station agent at Rice Lake. The party transferred to the defendant's passenger train at St. Paul. Before the train reached Minneapolis, the conductor took up the tickets of the plaintiff and his wife, and the half-fare ticket of the boy, and demanded half-fare tickets for the other two children who were over 5 years old, or the payment of $40, the price thereof. The father declined to pay any fare for the two children, for the reason, as he stated to the conductor, that he had an agreement with the agent when he purchased the tickets that the price paid therefor should entitle himself and his family to be carried to their destination. The conductor upon such refusal caused the child 8 years old, a boy, to be put off the car at Minneapolis, but he immediately returned into the car. The conductor attempted to get hold of the 6-year-old child, a girl, to put her off, who was in a seat with her mother. In such attempt it is alleged that the conductor assaulted the mother, and that she was frightened by what took place in the attempt to remove the

children from the car, whereby her health was seriously imparied. The father paid the $40 demanded, to avoid further trouble, and the party were carried to their destination. The conductor did not tender back any of the tickets which he had taken up. * * * *

The action of Caroline Sanderson, the wife, was brought to recover damages in the sum of $2,000 on account of personal injuries sustained by the alleged assault made upon her by the conductor, and by reason of fright and shock due to the attempt to separate her children from her. The trial court at the close of the evidence directed a verdict for the defendant in the case of Caroline Sanderson, and she appealed to this court from an order denying her motion for a new trial. * * * *

2. The question to be determined on the appeal of Mrs. Sanderson, hereafter designated as the plaintiff, is whether the evidence tends to show any legal basis for the recovery of damages by her. The evidence relevant to her case tends to show that her husband was on the train with and in charge of his family, and that he made the arrangements for their transportation, and that the station agent of whom he bought the tickets agreed that the sum paid to him therefor should be in full for the transportation of the entire family to their proposed destination, and, further, that the rules and rates of the defendant required that each of the children over 5 and under 12 years should be provided with half-fare tickets; that when the conductor caused the boy to be removed from the train, and attempted to eject the girl because the father refused to pay their fare, the plaintiff was greatly frightened by what occurred, and as a result of such fright she was made ill, and her health permanently impaired. The evidence, however, failed to show that any assault was committed upon her by the conductor, or anything done by him to cause her to apprehend any violence or injury to herself. She testified that her injury resulted wholly from fright, and that the conductor did not touch her, any more than to crowd in by her; that is crowd her in trying to get past her to where the girl was. It may be assumed for the purpose of this decision, only, that his act was wrongful as to the children. The plaintiff's case is, then, one where it is sought to recover damages for personal injuries due solely to fright and grief because an attempt was made to put her children off the car, and one where there was no tort against her, and no fear on her part of any physical injury or personal violence.

The great weight of authority sustains the doctrine that there can be no recovery for fright which causes injury without impact; that is, in the absence of any contemporaneous physical injury to the plaintiff. Notes to Gulf Ry. Co. v. Hayter, 77 Am. St. Rep. 862 (s. c. 54 S. W. 944, 47 L. R. A. 325). This rule, as thus broadly stated, has not been accepted by this court; but, with the modification hereafter stated, it is the law of this state. In the case of Renner v. Canfield, 36 Minn. 90, 30 N. W. 435, 1 Am. St. Rep. 654, the defendant shot a dog in the highway; and the plaintiff, a woman standing near, whom the defendant did not see at the time he fired, was so seriously frightened by the report of the gun that she had a miscarriage, as the result thereof. It was held in that case that the plaintiff could not recover, for the reason that the fright was not the result of any legal wrong to her. It was held in the case of Keyes v. Railway Co., 36 Minn. 290, 30 N. W. 888, that the mental distress and anxiety which may be proven in actions for personal injuries must be confined to such as are connected with bodily injury; that fear and anxiety for the safety of others cannot be made the basis for the recovery of damages. In the case of Larson v. Chase, 47 Minn. 307, 50 N. W. 238, 14 L. R. A. 85, 28 Am. St. Rep. 370, it was stated as a rule that no action for damages will lie for an act which, though wrongful, infringed no legal right of the plaintiff, although it may have caused him mental suffering.

The case of Purcell v. Railway Co., 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203, was one where a pregnant woman was a passenger on one of the defendant's cars, and by its negligence in the management of its cars at a street crossing a collision seemed inevitable, and she was placed in a position of such apparent imminent peril as to cause fright, which caused a miscarriage; and it was held, though there was in fact no collision and no impact, that the defendant's negligence was the proximate cause of the plaintiff's injury, and that she was entitled to recover for the consequences of her fright. It is to be noted in this case that the defendant's negligence which caused the fright was a legal wrong to the plaintiff as well as to all of her fellow passengers. In other words, the act of the defendant which caused the plaintiff's fright was a tort against her. In the case of Buckman v. Railway Co., 76 Minn. 373, 79 N. W. 98, the plaintiff, a married woman, entered with her husband the ladies' waiting room in the defendant's depot; and the station agent unlawfully and untruthfully charged

her companion with not being her husband, and used violent, offensive, threatening, and abusive language to him, and ordered him to leave the room, whereby she suffered a nervous shock which resulted in serious physical injuries. It was held that these facts afforded no legal basis for the recovery of damages by her, for the reason that the use of abusive language to her husband was not an infraction of her legal right, and hence not a legal wrong to her, and for the further reason, as stated by BUCK, J., that: "She apprehended no danger to herself. At least, she could not reasonably do so. She was not in any place of peril. If an action of this kind can be maintained, we do not see why nervous and sensitive persons present at a riot or public disturbance cannot have a cause of action if thereby they become nervous and sick, or suffer mentally, even if they do not receive bodily injury." This Purcell Case has been criticised by some eminent courts, and approved by others, but it would seem that the trend of the more recent cases is to approve it. See 15 Harv. Law Rev. 304; 41 Am. Law Reg. 141. However this may be, it is the law of this state, and we are not disposed to question it, much less to overrule it. It is in entire harmony with the other decision of this court which we have cited, for it is distinguished from them by the fact that the fright of the plaintiff was due to a legal wrong of the defendant against the plaintiff, which was not the fact in the other cases. The question whether fright alone would constitute such injury that the law will allow a recovery for it was not involved in that case.

From a consideration of the decisions of this court cited, we hold that there can be no recovery for fright which results in physical injuries, in the absence of contemporaneous injury to the plaintiff, unless the fright is the proximate result of a legal wrong against the plaintiff by the defendant. As already stated, the plaintiff's case is not within the exception, and it follows that the trial court rightly directed a verdict for the defendant.

Order affirmed.

WESTERN UNION TELEGRAPH CO. v. SKLAR.

(126 Federal Reporter 295.—1903.)

LURTON, Circuit Judge. This was an action by the addressee of a prepaid telegraphic message to recover damages for delay in its delivery. The message was in these words:

St. Louis, Mo., Jan. 21, 190–.

Mrs. Mary Sklar or Sklor, 450 N. Spruce Street, Nashville, Tenn.: Your daughter, Sarah, died this morning at City Hospital, shall I send remains to you, answer, letter on road to you.

Lulu Morrison, 2117 Chestnut St.

The message was prepaid. The declaration charged that the delivery of the message was so unreasonably delayed that the plaintiffs, not knowing the condition of the body, ordered the remains to be interred in St. Louis, without having an opportunity to see the remains of their daughter, and that but for the delay in delivery plaintiffs would have gone to St. Louis, or had the body forwarded to them at Nashville. There were two counts—one a common-law count based wholly upon an alleged liability of the telegraph company to the plaintiff, as the addressee, for negligence in delivery; the other upon a statute, being sections 1837 and 1838, Shannon's Tennessee Code. The defense was the general issue of not guilty. The jury were, in substance, instructed that, if they should find the defendant had been negligent in the delivery of the message to Mrs. Sklar, and that in consequence of such delay she had been deprived of the opportunity of seeing the remains of her daughter, or having her interred in the place of their residence, she would be entitled to recover for the mental anguish, grief, and disappointment incident entirely to such delay, and which would not have been sustained if the message had been delivered without unreasonable delay. There was a verdict and judgment for the plaintiffs.

There was no averment that the alleged negligence of the telegraph company was either willful or malicious. Neither was there a shred of evidence tending to show any willfulness or malice, and the court instructed the jury that no case existed for punitive damages. There was neither averment nor evidence tending to show any pecuniary loss whatever. Neither was there any averment or proof of any bodily injury. The verdict returned was confessedly

for damages to the feelings of the plaintiff. The common law gives no redress for mental suffering which is not the inseparable accompaniment of some form of physical injury. Cooley on Torts, 271; Lynch v. Knight, 9 H. L. 577; Wyman v. Leavitt, 71 Me. 227, 36 Am. Rep. 303; Wood's Moyne on Damages, 75; Chase v. W. U. Tel. Co. (C. C.) 44 Fed. 554, 10 L. R. A. 464; W. U. Tel. Co. v. Wood, 57 Fed. 471, 6 C. C. A. 432, 451, 21 L. R. A. 706; West v. Tel. Co., 39 Kan. 93, 17 Pac. 807, 7 Am. St. Rep. 530; W. U. Tel. Co. v. Rogers, 68 Miss. 748, 9 South. 823, 13 L. R. A. 859, 24 Am. St. Rep. 300; W. U. Tel. Co. v. Ferguson, 157 Ind. 37, 60 N. E. 679; Morton v. W. U. Tel. Co., 53 Ohio St. 431, 41 N. E. 689, 32 L. R. A. 735, 53 Am. St. Rep. 648; Chapman v. Tel. Co., 88 Ga. 763, 15 S. E. 901, 17 L. R. A. 430, 30 Am. St. Rep. 183; Connell v. Tel. Co., 116 Mo. 34, 22 S. W. 345, 20 L. R. A. 172, 38 Am. St. Rep. 575; Gahan v. Telegraph Co. (C. C.) 59 Fed. 433. Many additional authorities are cited in a useful note to the case of Chicago, R. I. & P. R. v. Caulfield, 11 C. C. A. 552, 556.

The actions for seduction and breach of marriage promise rest upon fictions which are altogether peculiar. In actions for personal injuries mental suffering is inseparably associated with bodily pain as an incident. Compensation therefore includes in such cases both kinds of suffering, the law refusing to separate the one from the other. "It is impossible to exclude the mental suffering in estimating the extent of personal injury for which compensation is to be awarded." Kennon v. Gilmer, 131 U. S. 22, 26, 9 Sup. Ct. 696, 33 L. Ed. 110; Seger v. Barkhamsted, 22 Conn. 298; Canning v. Williamstown, 1 Cush. 452; Chicago, R. I. & P. R. v. Caulfield, 63 Fed. 396, 11 C. C. A. 552. Under the Tennessee statutes, which give a right of action to the administrator of one tortiously killed, and authorize a recovery of the damages which the deceased sustained, and in addition those sustained by the widow and next of kin, for whose benefit the right of action is preserved, it is held that damages for the mental suffering of the deceased may be recovered, but that only the pecuniary loss of the widow and next of kin can be compensated, and that their mental suffering is not to be regarded as an element of damages. Railroad Co. v. Stevens, 9 Heisk, 12. So far, therefore, as the suit was a common-law action, unaffected by any Tennessee statute of controlling influence, it must fail.

The question as to the liability of a telegraph company for dam-

ages for the failure to properly transmit or promptly deliver a message is a question of general, and not local, law, and, in the absence of some statute regulating the subject, it is the duty of a court of the United States to decide such general question independently. W. U. Tel. Co. v. Wood, 57 Fed. 471, 6 C. C. A. 432, 451, 21 L. R. A. 706; W. U. Tel. Co. v. Cook, 61 Fed. 924, 9 C. C. A. 680; Felton v. Bullard, 94 Fed. 781, 37 C. C. A. 1, 4; Railroad v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; Byrne v. Kansas City R. R. Co. 61 Fed. 605, 9 C. C. A. 666, 24 L. R. A. 693.

The real question in the case is as to the effect to be given to the Tennessee statute relating to telegraph companies. The only legislation upon the subject is found is sections 1837 and 1838, Shannon's Tennessee Code, which read as follows:

"1837. All other messages, including those received from other telegraph or telephone companies, shall be transmitted in order of their delivery, correctly, and without unreasonable delay, and shall be strictly confidential; provided, however, that arrangements may be made with the publishers of newspapers for the transmission of intelligence of general and public interest.

"In 1838. Any officer or agent of a telegraph or telephone company who willfully violates either of the provisions of the preceding section is guilty of a misdemeanor, and the telegraph or telephone company so violating is liable in damages to the party aggrieved."

This statute has been under consideration by the Supreme Court of Tennessee in Wadsworth v. W. N. Tel. Co., 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 864; Railroad v. Griffin, 92 Tenn. 694, 22 S. W. 737; Telegraph Co. v. Mellon, 96 Tenn. 66, 33 S. W. 725. * * * *

From this review of the opinions of the Supreme Court of Tennessee we conclude that the only influence or bearing of section 1838 upon the question of the right of this plaintiff to maintain this suit is that the statute confers the right to maintain an action to any person aggrieved against the company for any violation of the provisions of section 1837. But this is a right which that court also holds existed, irrespective of either section, upon common-law principles.

The statute does not define the "damages" which may be recovered in such an action, and the court does not construe it as in any way prescribing the measure or character of the damages recoverable. Upon the contrary, the Tennessee court holds that when a plaintiff has the right to recover "some damages" he may, in such

case, also recover damages for injured feelings. But this it maintains upon principles of general law, and not because the statute regulates the question. In the Wadsworth Case the plaintiff's declaration stated some pecuniary loss, as it was charged that she had paid for the delayed message. Her suit was therefore sustainable at common law to recover at least that small pecuniary damage, although this aspect of the case is not noticed in the opinion of the court. In the two subsequent cases of Railroad v. Griffin and Telegraph Co. v. Mellon the actions were sustained as suits by the "aggrieved" under the statute without regard to any actual pecuniary loss. In all three cases the right to recover nominal damages is made the predicate to the right to recover damages for injured feelings. This foundation, the right to recover "some damages," is also the basis of the Texas decisions followed by the Tennessee court. So Relle v. W. U. Tel. Co., 55 Tex. 310, 40 Am. Rep. 805, Gulf Ry. Co. v. Levy, 59 Tex. 563, 46 Am. Rep. 278, Gulf Ry. Co. v. J. T. Levy, 59 Tex. 542, 46 Am. Rep. 269; Stuart v. W. U. Tel. Co., 66 Tex. 580, 18 S. W. 351, 59 Am. Rep. 623.

We are not prepared to concede that any cause of action exists at common law to recover even nominal damages for the breach of a contract or for a tortious act of negligence, unless there is some averment that the act complained of has been productive of some pecuniary injury or other kind of loss or damage for which the law gives damages. In such circumstances the declaration would be demurrable as stating no cause of action. But granting that the Tennessee court has construed the Tennessee statute as conferring a right to recover at least nominal damages, although no such damages are averred, in any case of a violation of the statute, and in favor of any person "aggrieved" by such violation, regardless of the existence of any contractual relations between such person and the telegraph company, we find ourselves unable to follow that court in holding that this right to recover "some damages" upon some other ground carries with it the right to add to such nominal damages, damages for mental pain or grief or anguish. The question is one of general jurisprudence, and as such we must exercise an independent judgment.

The very great weight of opinion is against the view of this question entertained by the Tennessee court, and we feel ourselves constrained to hold that damages for mental suffering or injury to the feelings are not recoverable in either an independent action nor as additional damages when the plaintiff has averred and shown

some pecuniary damages. Damages for mental pain, grief, disappointment, etc., are recoverable at the common law only when the inseparable accompaniment and result of some bodily pain. The question has been so frequently discussed in so many courts that we do not feel justified in repeating the reasoning upon which this conclusion rests. Whenever the question has been decided in any federal court, the doctrine of the Texas and Tennessee cases has been repudiated as not sustained by the principles of the common law. Chase v. W. U. Tel. Co. (C. C.) 44 Fed. 554, 10 L. R. A. 464; Crawson v. W. U. Tel. Co. (C. C.) 47 Fed. 544; Wilcox v. R. & D. Rd. Co., 52 Fed. 264, 3 C. C. A. 73, 17 L. R. A. 804; Tyler v. W. U. Tel. Co. (C. C.) 54 Fed. 634; Kester v. W. U. Tel. Co. (C. C.) 55 Fed. 603; W. U. Tel. Co. v. Wood, 57 Fed. 471, 6 C. C. A. 432, 21 L. R. A. 706; Cahan v. W. U. Tel. Co. (C. C.) 59 Fed. 433; Chicago, etc., Ry. Co. v. Caulfield, 63 Fed. 396, 11 C. C. A. 552. In addition to these cases from the federal courts we cite but a few of the leading decisions from English and state Supreme Courts. W. U. Tel. Co. v. Rogers, 68 Miss. 748, 9 South. 823, 13 L. R. A. 859, 24 Am. St. Rep. 300; Chapman v. W. U. Tel. Co., 88 Ga. 763, 15 S. E. 901, 17 L. R. A. 430, 30 Am. St. Rep. 183; Morton v. W. U. Tel. Co., 53 Ohio St. 431, 41 N. E. 689, 32 L. R. A. 735, 53 Am. St. Rep. 648; W. U. Tel. Co. v. Ferguson, 157 Ind. 64, 60 N. E. 674, 1080, 54 L. R. A. 846; Connell v. W. U. Tel. Co., 116 Mo. 34, 22 S. W. 345, 20 L. R. A. 172, 38 Am. St. Rep. 575; Mitchell v. Rochester, etc., Co., 151 N. Y. 107, 45 N. E. 354, 34 L. R. A. 781, 56 Am. St. Rep. 604; West v. W. U. Tel. Co., 39 Kan. 93, 17 Pac. 807, 7 Am. St. Rep. 530; Lynch v. Knight, 9 House of Lords Cases, 577; Railway Com'rs v. Coultas, L. R. 13 App. Cases, 222.

The conclusion we reach is that the plaintiff's declaration stated no cause of action. The first or common-law count was bad because it contained no averment of any pecuniary loss or damage whatever, and was nothing more or less than a straight action to recover damages for mental pain, grief, etc.

The second count was treated as an action under the statute. But the statute gives the remedy only when the violation of the law has been "willful." There was no averment of willfulness, and no facts stated which imply willfulness. Neither did this count include any averment of pecuniary damage. It was therefore insufficient to support any judgment under the statute or at common law.

Remand, with directions to arrest the judgment, and render judgment for the defendants upon the pleadings.

CHAPTER IV.

PARTIES TO TORT ACTIONS.

§ 1.—CORPORATIONS.

BIGBY v. UNITED STATES.

(188 U. S. 400; 23 Sup. Ct. 468.—1902.)
Reported, *Supra*, p. 22.

WOODEN WARE COMPANY v. UNITED STATES.

(106 U. S. 432; 1 Sup. Ct. 398.—1882.)
Reported, *Infra*, p. 505.

SUMMERS v. DAVIESS COUNTY.

(108 Ind. 262.—1885.)

ELLIOTT, J. The appellant alleges in her complaint that she fell and broke her leg; that she was poor and unable to procure a surgeon to attend her, and that James F. Parks was employed by the county to give medical and surgical attention to those who were too poor to employ physicians and surgeons. It is also averred that "James F. Parks, at the time he was so employed was not a skillful physician having a knowledge of surgery, but, on the contrary, was unskillful in the profession, and had no knowledge of surgery, and was incompetent to intelligently perform the duties of a physician and surgeon." It is further alleged that Parks was called upon to attend the appellant, and that his want of knowledge and lack of skill were such that he so unskillfully and improperly treated her as to do her great injury. If, in any case, a recovery could be had against the county for the unskillful and improper manner in which a surgeon treated an injured poor person, it is

clear that there can be none in this, for it does not appear that the board of commissioners did not exercise care and diligence in the selection of the physician for the poor. Where care and diligence are used in the selection of a physician, the officers representing the county have done their duty, and where there is no breach of duty there can be no negligence. Mere errors in judgment do not constitute negligence. We put our decision on broader grounds. The commissioners are public officers, charged with the performance of public duties, and in the performance of public duties they are not mere agents. It is true that officers occupying positions similar to those held by county commissioners are often spoken of as agents, and, in some cases, it is, perhaps, proper to treat them as agents. But even when such officers are regarded as agents, a broad and important difference is noted between public and private agents, and essentially different rules govern the two classes. Newman v. Sylvester, 42 Ind. 106; Jackson v. School Tp., 90 Ind. 101; Reese School Tp. v. Dodson, 98 Ind. 497; Union School Tp. v. First Nat'l Bank, 102 Ind. 464; Platter v. Board, etc., post, p. 360.

Where the duties delegated to officers elected by public corporations are political or governmental, the relation of principal and agent does not exist, and the maxim, *respondeat superior,* does not govern. This rule is illustrated in many cases. In the case of Ogg v. City of Lansing, 35 Iowa, 495, 14 Am. R. 499, it was held that a city was not liable for the negligence of persons placed in charge of a smallpox hospital which the city had established. It was said in the course of the opinion in that case, that "It is impossible to conceive of the endless complications and embarrassments which such a doctrine would involve, and of the extent to which the public interests would thereby suffer. It is safe to assume that if such were recognized as the law, no town would voluntarily assume corporate functions, and that every industrial and commercial interest would become paralyzed." The recent case of Bryant v. City of St. Paul, 21 Central L. Jour. 33, is directly in point. It was there held that a city was not liable for the misfeasance of members of the board of health selected by the city. Many authorities are cited in the note appended to that case, and from them it appears that the doctrine that public corporations to whose officers governmental powers are delegated, are not responsible for the negligence of the officers in the exercise of these governmental

powers. This doctrine has long prevailed in this State. Brinkmeyer v. City of Evansville, 29 Ind. 187; Robinson v. City of Evansville, 87 Ind. 334, 44 Am. R. 770; Faulkner v. City of Aurora, 85 Ind. 130, 44 Am. R. I.; City of La Fayette v. Timberlake, 88 Ind. 330.

We have many cases holding that counties, townships and cities are instrumentalities of government, and it must, therefore, be true that where they act simply as the local government they act for the State. As the State is not liable for the acts of its officers, neither can the public corporations be held liable for the acts of their officers in the exercise of political powers. Robinson v. Schenck, 102 Ind. 307; Justice v. City of Logansport, 101 Ind. 326; Kistner v. City of Indianapolis, 100 Ind. 210.

There is no more reason for holding counties liable for the negligence of the commissioners in the exercise of the governmental functions delegated to them, than there is for holding cities liable for the acts of their firemen or police officers, or for holding counties and townships responsible for the torts of sheriffs and constables. In providing for the care of the poor, a police power which resides primarily in the sovereignty is exercised, and neither the sovereign nor the local governing body to whom such a power is delegated is responsible for the misfeasance of its officers.

Judgment affirmed.

COLLINS v. INHABITANTS OF GREENFIELD.

(172 Mass. 78; 51 N. E. 454.—1898.)

HOLMES, J. This is an action for injuries suffered by the plaintiff's intestate, Michael Collins, and causing his death, while in the defendant's employ. The case is here on exceptions to a refusal to direct a verdict for the defendant, and to one or two less important rulings. Collins was engaged in raking stones down a hillside upon land belonging to the defendant, that they might be gathered and broken up in a stone crusher for use in macadamizing the defendant's streets. Above him was a large, overhanging rock, which looked safe from where he was at work, but which had a large crack behind it, perhaps in consequence of some blasting done

two days before. This rock fell a few minutes after Collins went to work, and crushed him. There was evidence that the superintendent, one Wait, put Collins to work where he was hurt; that Wait had been told that the rock which fell upon Collins could and ought to be barred down without further blasting; and that Wait had said that he would see to it.

The facts stated thus far are all that are material to the argument that Collins took the risk of the rock falling, which is one of the grounds on which the main exception is supported. The jury might have found that there was a special and concealed danger, of which the defendant had notice, but which Collins did not know, and had no chance to find out, and that, therefore, Collins was not negligent, or did not take the risk, whichever phrase be preferred. Burgess v. Ore Co., 165 Mass. 71, 42 N. E. 501; McKee v. Tourtellotte, 167 Mass. 69, 44 N. E. 1071.

Another ground on which the defendant claims immunity is that the work was under the charge of a public officer,—the superintendent of streets. Clark v. Easton, 146 Mass. 43, 14 N. E. 795; Pratt v. Waymouth, 147 Mass. 245, 17 N. E. 538; Prince v. City of Lynn, 149 Mass. 193, 21 N. E. 296; Hennessey v. City of New Bedford, 153 Mass. 260, 26 N. E. 999; McCann v. City of Waltham, 163 Mass. 344, 40 N. E. 20; Jensen v. City of Waltham, 166 Mass. 344, 44 N. E. 339; Taggart v. City of Fall River, 170 Mass. 325, 49 N. E. 622; Mahoney v. City of Boston (Mass.) 50 N. E. 939. We assume for the purposes of decision that the superintendent was appointed properly, and held his office lawfully, as well as *de facto*. Clark v. Easton, 146 Mass. 43, 45, 46, 14 N. E. 795. We assume, also, that there was no such control exercised by the selectmen as to make the town liable on the ground of their interference. But the jury were warranted in finding that the work which Collins was doing was in aid of macadamizing a particular street,—Federal street,—and this was work which primarily it was the duty of a street-railway company to do, under Pub. St. c. 113, § 32, at least for the most part, and so far as it went beyond the 18 inches on the sides of the track, according to the exceptions, was the duty of the same company, by the conditions of the location of its franchise. The town did the work in pursuance of an arrangement with the railway company by which the railway company was to pay, and did pay, it "the portion of the expense belonging to" the company. It would seem from this language quoted from the

town vote, and from the report of the selectmen, that the company did not pay the whole bill; but we must assume from the statement in the exceptions previously quoted that the body of the work was what the company was bound to do. The town also sold a small amount of the crushed stone to private persons.

On these facts the jury were warranted in finding that the town, whatever its public duty as to a portion of the street, did the work voluntarily as a private enterprise, and not under the compulsion of statute, when it might have left it all to the railway company as a duty which the company had assumed. The jury might have found further, as they naturally would if they took the first step, that the superintendent of streets was acting, not as an independent public officer, but, for the time being, as the agent of the town. The question is not whether the town could modify its duty to the public by a private arrangement, or by the terms of its grant to the railway company alone, as matter of law, as may happen in some cases,—for instance, that of landlord and tenant,—but whether, as matter of fact, the town, from private motives, undertook a work which actually it might have left to be done by another, and employed Collins to aid it in that voluntary task. If the jury took this view of the facts, the town was liable for Collins' death. Waldron v. Haverhill, 143 Mass. 582, 10 N. E. 481; Neff v. Inhabitants of Wellesley, 148 Mass. 487, 20 N. E. 111; Sullivan v. Holyoke, 135 Mass. 273; Deane v. Inhabitants of Randolph, 132 Mass. 475. * * *

Exceptions overruled.

FOLK v. CITY OF MILWAUKEE.

(108 Wis. 359; 84 N. W. 420.—1900.)

This is an action brought by the administrator of the estate of Florence Folk to recover damages for the death of said Florence, caused by the negligence of the defendant. A general demurrer to this complaint was sustained, and the plaintiff appeals.

WINSLOW, J. The question is whether a city is liable for the death of a child lawfully attending one of its public schools, when such death is caused by negligently allowing the sewer of the school

building to become clogged up. We think this question must be answered in the negative.

This court early adopted and has consistently maintained the rule that a municipal corporation is not liable for injuries resulting from the acts or defaults of its officers where it is engaged in the performance of a merely public service, from which it derives no benefit in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by the law for the general welfare of the inhabitants or of the community. Hayes v. City of Oshkosh, 33 Wis. 314. The case cited was one where the negligence claimed was the negligence of firemen in the discharge of their duty, and the same principle has been applied to the acts of taxing officers, policemen, and health officers. Wallace v. City of Menasha, 48 Wis. 79, 4 N. W. 101; Kuehn v. City of Milwaukee, 92 Wis. 263, 65 N. W. 1030; Kempster v. City of Milwaukee, 103 Wis. 121, 79 N. W. 411. That the city is performing such a public duty in maintaining public schools cannot be doubted. The principle is thus stated in 1 Shear. & R. Neg. (5th Ed.) § 267: "The duty of providing means of education at the public expense by building and maintaining school houses, employing teachers, etc., is purely a public duty, in the discharge of which the local body, as the state's representative, is exempt from corporate liability for the faulty construction or want of repair of its school buildings, or the torts of its servants employed therein." The leading case upon the subject is probably the case of Hill v. City of Boston, 122 Mass. 844, where the whole field was very learnedly and exhaustively discussed. This case has been followed in principle by other courts. Wixon v. Newport, 13 R. I. 454; Donovan v. Board, 85 N. Y. 117; Hughes v. City of Auburn (N. Y. App.) 55 N. E. 389; Ford v. School Dist., 121 Pa. St. 543, 15 Atl. 812, 1 L. R. A. 607; Finch v. Board, 30 Ohio St. 37.

While the exact question here presented is new in this court, the weight of authority (especially in Massachusetts, from which state we have so largely taken our doctrine as to municipal liability for torts) is so strong in favor of the rule quoted above that we feel no hesitation in following it. Nor is the rule unreasonable. Indeed, were a recovery possible under the facts stated here, no reason is perceived why damages might not be allowed for every sickness suffered by a scholar which could be traced to defective or injudicious heating, ventilation, or lack of ventilation of a school building.

Such a result would be intolerable, and might necessitate the closing of schools, by the exhaustion of funds to discharge such judgments.

We do not lose sight of the fact that there is another principle frequently approved by this court, namely, that a municipal corporation may not construct or maintain a nuisance in the street or upon its property to the damage of another, or negligently turn water or sewage upon the lands of another without liability. Gilluly v. City of Madison, 63 Wis. 518, 24 N. W. 137; Hughes v. City of Fond du Lac. 73 Wis. 380, 41 N. W. 407; Schroeder v. City of Baraboo, 93 Wis. 95, 67 N. W. 27. These cases all go upon the principle that the city cannot in the management of its corporate property create a nuisance injurious to the property or rights of others. In none of these cases were the city officers who were guilty of negligent or wrongful acts acting in a governmental capacity towards the person injured. In the present case, however, there can be no doubt that in the management of the school house the city officers were acting in a purely governmental capacity, as far as their relations to the deceased child were concerned. This consideration is, we think, controlling, and results in affirmance of the ruling of the trial court.

Order affirmed.

JONES v. CITY OF WILLIAMSBURG.

(97 Va. 722; 34 S. E. 883.—1900)

RIELY, J. The plaintiff was struck and injured by a bicycle that was being ridden upon a sidewalk of one of the streets of the defendant corporation, and brought this action to recover damages for the injury. There was a demurrer to the declaration, which was sustained by the circuit court, and the case is before us upon a writ of error.

The complaint is not that the injury was caused by a bicycle that was stationary upon the sidewalk, and had been negligently allowed by the city to remain there, but that it was due to the propulsion of the bicycle against the plaintiff, while in motion, under the power and will of its rider. It is obvious, therefore, that, if the city be liable in damages for the injury, its liability results, not

from a defective condition of the sidewalk, but from the improper and dangerous use that was being made of it by the bicyclist.

A municipal corporation has a dual character, the one public and the other private, and exercises correspondingly twofold functions, the one governmental and legislative, and the other private and ministerial. * * * *

Cases doubtless arise in which the courts experience difficulty in determining whether the injury complained of is the result of the failure to exercise, or the negligent exercise, of a governmental and public power, or is due to negligence in the exercise or performance of a ministerial and private power or duty; but, as respects the particular case before us, there is no such difficulty.

Streets, like other highways, are for the use of the public, and their use is none the less for the public at large because they are within the municipality, and subject to its supervision and control. Streets, as popularly distinguished from sidewalks, though including the latter, are principally designed for the use of vehicles and animals, and sidewalks for the use of pedestrians. Bicycles come under the definition and description of vehicles, and sidewalks are not the proper place for them. But the right to regulate the use of the highways of the state or of the streets of a city is clearly a governmental power, and its exercise, whether by the state or by a municipal corporation as an agency of the state, is legislative and discretionary; and, being legislative and discretionary, a municipal corporation, as an arm of the state, is no more liable for the failure to exercise the power or for its improper exercise than the state itself would be. * * * *

The peace, good order, and welfare of a community is a primary object of government, and laws are enacted by the sovereign power, and ordinances adopted by municipal corporations, for the preservation thereof; but clearly neither the state, nor the municipality, would be liable for an injury received in an affray upon one of its streets, or in a collision from fast riding or driving, in consequence of the absence of a law or ordinance prohibiting the same, or the failure of the authorities of the state or city to enforce it, if enacted or adopted, although but for the want of a proper law or ordinance, or the failure to enforce the same, the injury would not have happened. The government does not guaranty its citizens against all the casualties incident to humanity, and cannot be called upon to compensate, by way of damages, its liability to protect against

such accidents and misfortunes. The failure to pass a needful law or ordinance is plainly the omission by the state or city as an agency thereof of a public, governmental duty, for which no action lies. Hence, upon this principle, it has been held by the courts, and laid down by approved text writers, that a municipal corporation, in the absence of an express statutory declaration to the contrary, is not liable for failing to pass an ordinance prohibiting the firing of cannon or firearms in its streets, or the explosion of fireworks, or the engaging in dangerous sports, or the running at large of cattle and swine, or for suspending or neglecting to enforce an ordinance against such dangerous practices and improper use of its streets, in consequence whereof private property was destroyed or persons injured. Elliott, Roads & S. 465; 2 Dill. Mun. Corp. (4th Ed.) § 949, note; 1 Shear. & R. Neg. (5th Ed.) § 262; Cooley, Const. Lim. (6th Ed.) note to page 254; Cooley, Torts (2d Ed.) 739; Boyland v. Mayor, etc., 1 Sandf. 27; Levy v. Same, Id. 465; Ball v. Town of Woodbine, Iowa, 83, 15 N. W. 846; Davis v. City Council, 51 Ala. 139; Hill v. Board, 72 N. C. 55; Kelley v. City of Milwaukee, 18 Wis. 83; Rivers v. City Council, 65 Ga. 376.

The doctrine of the exemption of a municipal corporation from liability for injuries resulting from the unlawful or improper use of its streets and sidewalks, and not from any defect in their state or condition, has been applied where persons have been injured by "coasting,"—a practice so similar to the use of sidewalks by a bicyclist that a different conclusion cannot be reached in the case of an injury caused by a collision with a bicycle. City of Lafayette v. Timberlake, 88 Ind. 330; Faulkner v. City of Aurora, 85 Ind. 130; Pierce v. City of New Bedford, 129 Mass. 534; Steele v. City of Boston, 128 Mass. 583; Shepherd v. Inhabitants of Chelsea, 4 Allen, 113; Schultz v. City of Milwaukee, 49 Wis. 254, 5 N. W. 342; Burford v. City of Grand Rapids, 53 Mich. 98, 18 N. W. 571; Hutchinson v. Town of Concord 41 Vt. 271; Weller v. City of Burlington, 60 Vt. 28, 12 Atl. 215; Ray v. City of Manchester, 46 N. H. 59; Mayor, etc., v. Vandegrift (Del. Err. & App.) 29 Atl. 1047, 25 L. R. A. 538.

The exemption of a municipality from liability for an injury resulting from the unlawful or improper use of its streets and sidewalks, with the reason therefor, is very clearly stated in City of Lafayette v. Timberlake, *supra,* a case of injury resulting from "coasting" upon a sidewalk, where the court said:

"The manner in which a highway of a city is used is a different thing from its quality and condition as a street. The construction and maintenance of a street in a safe condition for travel is a corporate duty, and for a breach of such duty an action will lie; but making and enforcing ordinances regulating the use of streets brings into exercise governmental, and not corporate, powers, and the authorities are well agreed that, for a failure to exercise legislative, judicial, or executive powers of government, there is no liability."

An injury caused by a bicycle ridden upon a sidewalk is not distinguishable from an injury caused by "coasting," and the ground of exemption from liability applies equally in the former case as in the latter. In Howard v. City of Brooklyn, 30 App. Div. 217, 51 N. Y. Supp. 1058, it was held that "a municipal corporation which has merely failed to pass an ordinance forbidding bicycles to be ridden over a sidewalk of the city, not having in any way authorized it, is not liable to a person walking upon the sidewalk for injuries resulting from being run into and thrown down by a bicycle."

Our conclusion is that the declaration does not state a case of legal liability, and that the demurrer was properly sustained.

The judgment of the circuit court must be affirmed.

CRAIG v. CITY OF CHARLESTON.

(180 Ill. 154; 54 N. E. 184.—1899.)

PER CURIAM.[1] In affirming the judgment of the circuit court for costs and sustaining the demurrer to the plaintiff's declaration, the following opinion, delivered by Mr. Justice HARKER, was rendered by the appellate court:

"The sufficiency of the declaration is the only question for our consideration. Stripped of their surplusage, the material averments of fact are that the city of Charleston, on an occasion when a large crowd of people had congregated in the city, appointed one John

[1] In Lahner v. Incorporated Town of Williams, 112 Ia. 428; 84 N. W. 507 (1900), the court held that a municipal corporation was not liable for the arrest of plaintiff by its officers, without cause, and for his imprisonment in a cold, filthy, and unhealthy calaboose.

Apgar as an officer to prevent the obstruction of the streets by vehicles or otherwise, and placed him in control of one of the streets; that Apgar was a dangerous and violent man, and possessed an ungovernable temper and vicious disposition, which facts were known, or by the exercise of reasonable diligence could have been known to the appointing officer; that Apgar, while in charge of the street and under pretense of discharging his duty, made a brutal and unjustifiable assault upon the plaintiff with a stick, whereby the plaintiff lost one of his eyes, and was otherwise injured. The duties devolving upon Apgar by virtue of his appointment were police duties. He was what is sometimes aptly termed a 'special policeman,' authorized to perform certain specific acts. It is a familiar rule of law, supported by a long line of well-considered cases, that a city, in the performance of its police regulations, cannot commit a wrong through its officers in such a way as to render it liable for tort.

"It is contended, however, that appellant does not base his right of recovery against the city upon the wrongful act of Apgar, merely, but upon the wrongful act of the mayor in appointing such a man as Apgar, when he knew, or should have known, of his dangerous and vicious character. The same principle which absolves the city from liability for Apgar's tortious act applies to the act of the mayor. The mayor was simply exercising a discretion vested in him by virtue of his office and the laws of the state. If the appointment was a wrongful act, which resulted in injury to the appellant, the burdens of liability cannot be cast upon the inhabitants and taxpayers of the city. A municipal corporation, while simply exercising its police powers, is not liable for the acts of its officers in the violation of the laws of the state and in excess of the legal powers of the city. Dill. Mun. Corp. §§ 950, 968; Town of Odell v. Schroeder, 58 Ill. 353; City of Chicago v. Turner, 80 Ill. 419; Wilcox v. City of Chicago, 107 Ill. 334; Blake v. City of Pontiac, 49 Ill. App. 543.

"Appellant further contends that the placing of Apgar in the street and in control of it was the creation of a nuisance, upon which ground it is liable,—in fact, his chief contention is that he became thereby an obstruction in the street,—and cites a long list of authorities in support of the proposition that it is the duty of a city to keep its streets free from obstructions, and a failure in that regard will render it liable for injuries caused thereby. We cannot regard a

human being in the exercise of police powers, as an obstruction, in the sense contemplated by the unquestioned doctrine announced by those cases. We think the court properly sustained the demurrer to the declaration."

"After a careful consideration of the case, we have reached the same conclusion as that arrived at by the courts below; and concurring in the views of the appellate court, we see no necessity for another opinion on this appeal, but adopt the one above quoted."

SAUNDERS v. CITY OF FT. MADISON.

(111 Ia. 102; 82 N. W. 428.—1900.)

DEEMER, J. The petition alleges, in substance, that while plaintiff was driving along and over one of the streets in defendant city, and when opposite a fire station, its agents and servants, while in the line of their employment, and handling the fire apparatus of the city, negligently, carelessly, and wantonly caused the bell attached to said apparatus to be rung, thus frightening the horse that plaintiff was driving, causing him to run away and throw plaintiff from the vehicle in which she was riding, resulting in serious injury to her person; that these agents and servants after noticing that plaintiff's horse had become frightened, continued to ring the bell, and refused to desist, although requested by plaintiff to do so. Defendant's demurrer was on the grounds that it is not liable for the action of its agents, servants, or firemen who had control of the fire apparatus, and that in no event is it liable for the willful and malicious acts of its agents or servants while handling fire apparatus. This demurrer was sustained, and the question for solution is, is defendant liable for the negligent or careless acts of its agents and servants acting in the line of their duty in caring for the fire apparatus?

The doctrine of respondeat superior is not applicable to the acts or negligence of all agents and servants of a municipal corporation. Such a corporation, no doubt, has power to purchase and own fire apparatus, and may in some instances appoint the agents who are to manage and care for the same; but it is not, as a general rule, liable for the negligence or carelessness of such agents, for the reason that the service performed is one in which it has no particular

interest, and from which it derives no special benefit in its corporate capacity. Such employees are not agents and servants of the city, but act as officers charged with a public service, for whose negligence no action will lie against the city. Where the powers conferred are governmental in nature, the city cannot be made liable for execution thereof. Ogg v. City of Lansing, 35 Iowa, 495; Calwell v. City of Boone, 51 Iowa, 687, 2 N. W. 614.

In the absence of express statutes, municipal corporations are no more liable to actions for injuries occasioned by reason of negligence in using or keeping in repair fire apparatus owned by them, than in the case of public buildings. Hafford v. City of New Bedford, 16 Gray, 297; Eastman v. Meredith, 36 N. H. 284. In Burrill v. Augusta, 78 Me. 118, 3 Atl. 177, it appeared that the officers of the fire department carelessly and negligently left a fire engine standing within the limits of a public street in the defendant city, and, while so standing, drew the fire, and permitted the steam to escape with great noise, whereby plaintiff's horse was frightened and ran away, and plaintiff was thrown to the ground and injured. It was held that she could not recover, on the theory that these officers were performing a public duty, acting on their own responsibility, and that they were not officers and agents of the municipality in such sense as that defendant was responsible for their acts. Dodge v. Granger (R. I.) 24 Atl. 100, 15 L. R. A. 781, is another case directly in point. There the members of the fire department left a ladder truck standing so that the ladder projected across the sidewalk in front of an engine house, in consequence of which a passer-by was injured. The city was held not liable, because the members of the fire department were public officers, for whose acts the city was not liable. It was also held that it was the duty of the fire department to take care of its apparatus and keep it in proper condition for use, and that in doing this work it was performing the same duty as when actually engaged in extinguishing fires. Liability of the city for unnecessarily obstructing the street was conceded, but the case did not show any negligence in this respect. Wild v. Paterson, 47 N. J. Law, 406, 1 Atl. 490, and Welsh v. Village of Rutland, 56 Vt. 228, also involved liability of the city for the negligence of its officers and agents in keeping fire apparatus in good condition and repair; and in each case the city was held not liable for injuries growing out of its negligence in this respect. Negligence of a fireman in opening a door of an engine house so as to strike a passer-by on

the sidewalk did not render the city liable. Kies v. City of Erie, 135 Pa. St. 144, 19 Atl. 942. Acts of a voluntary association of firemen are to be regarded like those of paid firemen, in respect to the liability of a city. Torbush v. City of Norwich, 38 Conn. 225, 9 Am. Rep. 395. The following cases also add support to our conclusions: Smith v. City of Rochester, 76 N. Y. 507; Thomas v. City of Findlay, 6 Ohio Cir. Ct. R. 241; Gillespie v. City of Lincoln (Neb.) 52 N. W. 811, 16 L. R. A. 349; Pettingell v. City of Chelsea (Mass.) 37 N. E. 380, 24 L. R. A. 427. The Nebraska case is quite in point, and, following the general tenor of the authorities, it holds that a city is not liable where the injury complained of is due to the negligence of the driver of a ladder truck while exercising a team of horses belonging to the fire department of the city.

The demurrer was properly sustained, and the judgment is affirmed.[1]

BENNETT v. WHITNEY.

(94 N. Y. 302.—1884.)

FINCH, J. The principal dispute in this case respects the true nature and legal effect of the cause of action pleaded. The complaint is for negligence in leaving unguarded and unlighted an opening temporarily made in a city street. The defendants named are the mayor, the members of the common council, and the street commissioner of Binghamton, who are sued by their individual names, with the title of their respective offices added. The word "as" does not precede their official designations. The complaint alleges that the defendant, the mayor, and the defendants who constituted the common council, held those offices respectively, that by the city charter they were made commissioners of highways, and that it became and was their duty to keep the city streets in good order

[1] In Workman v. Mayor, etc., of New York, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. E. D. 314 (1900), the Supreme Court of the United States held the city liable in an admiralty proceeding, although admitting that the city was not liable at common law. Both the prevailing and dissenting opinions are worthy of careful study. In Missano v. Mayor, etc., of New York, 160 N. Y. 123, 54 N. E. 744 (1899), the court held the city liable for the torts of its street cleaning department. The dissenting opinion approved the opposite holding, in Connelly v. Mayor, etc., of Nashville, 100 Tenn. 262, 46 S. W. 565 (1898).

and protect any excavation made therein. It then avers the defendant Whitney was street commissioner of the city and had charge of the work upon the excavation from which the plaintiff's injury arose; that the mayor and common council directed it to be made and the defendant Whitney obeyed the direction; and that the mayor and common council and "the said street commissioner William Whitney," left the opening unguarded, and so were guilty of negligence which caused the injury. The complaint closes with a demand for judgment "against the defendants." The trial judge held, at the close of the case, that the action was against the defendants as individuals, and not as officers of the city. In this, we think, he was right. Whatever may have been some earlier doubts on the subject, it is settled in this court that one who assumes the duties and is invested with the powers of a public officer is liable to an individual who sustains special damage by a neglect properly to perform such duties. Hover v. Barkhoof, 44 N. Y. 113. Just this cause of action the complaint sets out. It alleges the assumption of official duties, and the possession of official power by the individuals named, their failure properly to perform those duties and a resultant injury to the plaintiff caused by such negligence. The omission in the summons of the word "as" before the official titles of the defendants, indicates that they were sued as individuals, and that the addition of their names of office was but *descriptio personæ*. * * * The trial judge, however, determined to hear and decide "the whole question," and, after argument, granted a nonsuit as to the mayor and common council, but held that the action was against the defendants individually, and the question of negligence, as to the defendant Whitney must go to the jury.

What has been said as to the proper construction of the complaint sufficiently indicates the ground of our concurrence with the conclusion of the trial court in that respect. The case therefore became one of negligence by an officer in the performance of official duty. Robinson v. Chamberlain, 34 N. Y. 389. It was not a case of non-feasance or omission to act at all, where in some cases as to the repair of highways, it may be necessary to show adequate means in the hands of the officer, but a case of misfeasance where he had acted, but conducted himself negligently to the special injury of an individual. Where that negligence is willful or intentional, the city charter makes it a misdeameanor, and "in addition thereto" declares the liability for damages to the party injured; but we do

not understand this provision as taking away, or in any manner destroying the right of the party injured to sue for simple negligence, where an official act or omission of duty has resulted in his injury. We agree with the General Term that the provision referred to did not repeal the common-law rule applicable to a case not named or made the subject of legislation by the charter itself, and was not intended to affect the rule of liability declared in the cases to which reference has been made.

The judgment and order should be affirmed, with costs.

WASHINGTON GAS-LIGHT CO. v. LANSDEN.

(172 U. S. 534; 19 Sup. Ct. 296.—1898.)

PECKHAM, J. * * * That a corporation may be held responsible in an action for the publication of a libel is no longer open for discussion in this court. Railroad Co. v. Quigley, 21 How. 202. In that case the company was held liable in damages to the plaintiff, Quigley, for the publication of a libel regarding the plaintiff's skill and capacity as a mechanic. Quigley brought his action against the company because the company published a letter addressed to it in the course of an investigation by its board of directors in regard to the conduct of some of its subordinates. The letter contained libelous matter in regard to the plaintiff, and, with much other testimony, was printed and published by the board of directors, and the court decided that the corporation could be held liable for the publication. In that case Mr. Justice CAMPBELL, in delivering the opinion of the court, said: "That for acts done by the agents of a corporation, in the course of its business and of their employment, the corporation is responsible either in *contractu* or in *delicto*, as an individual is responsible under similar circumstances." The doctrine of this case has been approved and reaffirmed in many cases in this court since that time.

The result of the authorities is, as we think, that, in order to hold a corporation liable for the torts of any of its agents, the act in question must be performed in the course and within the scope of the agent's employment in the business of the principal. The corporation can be held responsible for acts which are not strictly within the corporate powers, but which were assumed to be per-

formed for the corporation, and by the corporate agents who were competent to employ the corporate powers actually exercised. There need be no written authority under seal nor vote of the corporation constituting the agency or authorizing the act. But, in the absence of evidence of this nature, there must be evidence of some facts from which the authority of the agent to act upon or in relation to the subject-matter involved may be fairly and legitimately inferred by the court or jury. Salt Lake City v. Hollister, 118 U. S. 256, 260, 6 Sup. Ct. 1055; Railway Co. v. Harris, 122 U. S. 597, 609, 7 Sup. Ct. 1286; Railway Co. v. Prentice, 147 U. S. 101, 109, 13 Sup. Ct. 261, and cases cited at page 110, 147 U. S., and page 264, 13 Sup. Ct.

In this case no specific authority was pretended to have been given the general manager, Leetch, to write the letters which he sent to Brown, or to authorize the publication of anything whatever in the periodical named. We are, then, limited to an inquiry whether the evidence is sufficient upon which a jury might be permitted to base an inference that Leetch had the necessary authority to act for the company in this business. If different inferences might fairly be drawn from the evidence by reasonable men, then the jury should be permitted to choose for themselves. But if only one inference could be drawn from the evidence, and that is a want of authority, then the question is a legal one for the court to decide. We do not mean that, in order to render the company liable, there must be some evidence of authority, express or implied, given to the manager to publish or to authorize the publishing of a libel, but there must be some evidence from which an authority might be implied on the part of the manager to represent the company as within the general scope of his employment, in regard to the subject-matter of the correspondence between Brown and himself. There is no evidence of an express authority, nor of any subsequent ratification of Leetch's conduct by the company. Can any authority be inferred from the evidence as to the nature of the duties and powers of the manager? Were the acts of Leetch within the general scope of his employment as manager? Upon a careful perusal of the whole evidence, we find nothing upon which such an inference can be based,—nothing to show that any correspondence whatever, upon the subject in hand, was within the scope of the manager's employment.[1]

[1] In Palmeri v. Man. Ry. Co., 133 N. Y. 261, 30 N. E. 1001 (1892), the action was for false imprisonment accompanied by slanderous words, and recovery was sustained.

§ 2.—MEMBERS OF THE FAMILY.

HENLEY v. WILSON.

(137 Cal. 273; 70 Pac. 21.—1902.)

TEMPLE, J. Action for damages caused by a violent assault committed upon the plaintiff by the defendant Delphine Wilson, wife of the appellant, J. A. Wilson. It was admitted on the trial that the husband was not present at the time of the assault, and had no knowledge of the occurrence until some time afterwards. An instruction was asked by appellant to the effect "that the husband is not responsible for the wrongful acts of the wife committed out of his presence, and without his knowledge or consent." This was refused, and a verdict for plaintiff was returned, and judgment went against both defendants, from which the husband appeals. Whether this proposed instruction should have been given is the only question involved.

While there is a conflict in the authorities, appellant concedes at the outset that a majority of the cases still hold to the common-law rule which makes the husband liable absolutely for all torts committed by the wife. This statement is too broad. Pom. Rem. & Rem. Rights, §§ 320, 321, states that as to all torts committed by the wife, not done by means of, or in the use of, or in the assertion of some right in reference to, her separate property, the common-law rules remain unchanged. Since she is permitted to manage her separate estate as though she was a *feme sole*, it follows that in such management she must be responsible as a *feme sole*. The common-law rule must prevail unless it has been changed by statute. No express change has been made, but it is contended that, since the wife now retains as her own such property as she has at the time of the marriage, and such as she afterwards may acquire by gift, descent, or devise, and may manage her own separate estate, she should now be held solely responsible for her torts, on the principle that the reason for the common-law rule has ceased to exist, and therefore the rule should cease. But what all the reasons for the rule were originally is not now so easy to determine, and accordingly it was said by Mr. Justice FIELD in Van Maren v. Johnson, 15 Cal. 312: "It matters not what was the origin of the common-law doctrine; its rule is settled and exists independently of the grounds on which it originally rested." These rules are quite

ancient, and cannot be said to have been rested solely upon the fact that the husband may take all the wife's personal property and her earnings, and may control her person, or that she can have no estate from which a judgment against her could be satisfied, added to the supposed merger of her legal personality in his.

It was said by the supreme court of Texas in Zeliff v. Jennings, 61 Tex. 458, that the doctrine "rests perhaps mainly upon the supposition that her acts are the result of the superior will and influence of the husband. Owing to the intimate relation of husband and wife, and to the nature of the control given him by law and social usage over her conduct and actions, it would be difficult, if not impossible, for the courts to determine when she had acted at her own instance, and when she was guided by his dictation." And it may be added, in a case where the wife has no separate estate, if the husband cannot be held, the aggrieved person will have no redress, and upon the wife there will be no restraint of pecuniary responsibility. If so disposed, she could with impunity blast the lives of her neighbors by most grievous slander. Nor is it true, in the absolute sense, that she has no interest in the estate of her husband. She is entitled to a support out of it, and to be maintained in a degree of comfort proportionate to his wealth. To make this fortune liable for her torts may directly affect her. It may diminish her comfort and style of living. As to the community property, if the coverture is ended in any mode during her life without her fault, one-half of it will be hers. Most wives consider themselves equally interested in accumulations, and properly so. At common law, even, they had morally an interest in the fortune made or inherited by the husband. In some circumstances they could secure a separate maintenance from it on a scale proportionate to its amount. We hear much of the power over the wife given to the husband by the common law, which is now thought to have been oppressive. But it had its other side. It was calculated to make a more complete and indissoluble union, in which the wife had rights that could be lost only by her violation of her marriage vow, and, I think, to make the common earnings liable for the torts of each tended in the same direction. Each became the other's "keeper." These earnings are held by the husband, but are liable for the support of the wife.

Since the reasons of the common-law rule cannot now be fully known, we are at liberty to suppose that it was founded upon these

and many other considerations, as well as upon those usually stated. But many of the reasons upon which it is commonly supposed the common-law rule depended still subsist, and the express limitations upon the liability of the husband or of the community property for the debts of the wife imply that in other respects the common law still prevails. For instance, the husband is the head of the family, and may choose the residence. Civ. Code, § 156. He is entitled to the custody and control and to the earnings of minor children as against the wife (Id. § 197), unless during separation (Id. § 198). The provisions of the Code giving the wife the power to make contracts with reference to property negative the idea that she has in other respects the power or the responsibility of a feme sole. So section 167 of the Civil Code expressly provides what the community property shall not be liable for the debts of the wife contracted before marriage, leaving it still liable for her debts contracted after marriage. See In re Burdick's Estate, 112 Cal. 398, 44 Pac. 734, opinion of Mr. Justice HARRISON; also Van Maren v. Johnson, 15 Cal. 308; Vlautin v. Bumpus, 35 Cal. 214. Van Maren v. Johnson was a suit against husband and wife for services rendered the wife before marriage. Judgment was against both, but in terms it provided that it could be satisfied from her separate property or from the community property. The husband appealed, and the only question was as to the liability of the community property. Upon this question Judge FIELD said: "The statute in terms provides that the separate property of the wife shall be liable for her debts contracted previous to the marriage, and at the same time that the separate property of the husband shall not be thus liable. It is silent as to the liability of the common property as to such debts, and also as to the liability of that property for the previous debts of the husband." The learned judge then proceeds to show that the common law is the basis of our jurisprudence, and that the statute has modified that law, on this matter, only in two respects: "It renders the separate property of the wife liable and exempts the separate property of the husband. Beyond this exemption of his separate property his liability exists; that is to say, he is liable to the extent of the common property." That is, the common law prevails except as it has been modified by statute.

Furthermore, by the express provision of the statute, the wife cannot be sued without her husband for a tort which does not concern her separate estate. She can sue or be sued alone only when:

(1) The action concerns her separate property or her claim to the homestead; (2) when the action is between herself and husband; (3) when she is living in separation by his desertion, or under an agreement in writing. Code Civ. Proc. § 370. And it has been held that in an action for damages which accrue for the injury of the wife the husband must be joined; the recovery will be community property. McFadden v. Railroad Co., 87 Cal. 464, 25 Pac. 681, 11 L. R. A. 252; Neale v. Railroad Co., 94 Cal. 425, 29 Pac. 954. See, also Sheldon v. The Uncle Sam, 18 Cal. 527, 79 Am. Dec. 193. I think there would be no profit in discussing the cases cited by appellant from other states. In some, the statutes expressly provide against the liability of the husband for the torts of the wife. In others all the earnings of the wife during coverture, and all recoveries for personal injuries, are her separate property. In some cases the tort accrues in the management of her separate estate. But whatever the rule may be in other jurisdictions, the principles which are determinative of the case have been settled here, and are in accordance with the rule prevailing in a majority of the states. Some of the cases cited by the respondent are interesting, because they discuss the reason upon which the common-law rule was believed to be based. See Kowing v. Manly, 49 N. Y. 201, 10 Am. Rep. 346; Alexander v. Morgan, 31 Ohio St. 548; Heckle v. Lurvey, 101 Mass. 344, 3 Am. Rep. 366.

The judgment is affirmed.

TEXAS & P. R. CO. v. HUMBLE.

(181 U. S. 57; 21 Sup. Ct. 526.—1900)

This was an action brought by Emma Humble against the Texas & Pacific Railway Company in the circuit court of Miller county, Arkansas, to recover compensation for personal injuries sustained by her in the defendant's station at Texarkana, Arkansas, on April 9, 1898, by reason of defendant's negligence, and removed on defendant's petition to the United States circuit court for the western district of Arkansas. Plaintiff obtained judgment, which was affirmed by the circuit court of appeals for the eighth circuit, 138

C. C. A. 502, 97 Fed. Rep. 837, and thereupon this writ of error was sued out.

Mr. Chief Justice FULLER delivered the opinion of the court:

Plaintiff in error contends that the judgment should be reversed because the circuit court erred in declining to direct the joinder of the husband; in applying the law of Arkansas in the trial of the case, and not that of Louisiana; and in allowing impaired earning power to be considered as an element of recovery.

The statutes of Arkansas provided that a married woman might "maintain an action in her own name for or on account of her sole or separate estate or property, or for damages against any person or body corporate for any injury to her person, character, or property." Sandels & Hill's Dig. § 5641.

This action was brought in the state court, and removed on defendant's application. That transfer could not deprive plaintiff of the right secured to her by the local law to prosecute the suit in her own name and for her own benefit; and indeed by § 721 of the Revised Statutes, the law of Arkansas furnished the rule of decision. In some jurisdictions it is held under similar statutes that the wife must sue alone under circumstances, and that to make the husband a co-plaintiff works a fatal misjoinder. The circuit court was right, then, in not attempting to compel a joinder which the statute had expressly dispensed with. * * * *

The circuit court charged the jury that if they found for plaintiff they might take into consideration in assessing the damages "her age and earning capacity before and after the injury was received, as shown by the proofs," and refused an instruction to the contrary; and exceptions were duly preserved.

In view of the evidence, was plaintiff entitled to be allowed anything for diminution of earning capacity?

Section 7 of article 9 of the Constitution of Arkansas provides:

"The real and personal property of any *feme covert* in this state, acquired either before or after marriage, whether by gift, grant, inheritance, devise, or otherwise, shall, so long as she may choose, be and remain her separate estate and property, and may be devised, bequeathed, or conveyed by her the same as if she were a *feme sole*, and the same shall not be subject to the debts of her husband."

Sections 4940, 4945, 4946, 4949, and 5641 of Sandels & Hill's Digest of the Statutes of Arkansas are as follows:

4940. "The real and personal property of any *feme covert* in this state, acquired either before or after marriage, whether by gift, grant, inheritance, devise, or otherwise, shall, so long as she may choose, be and remain her separate estate and property, and may be devised, bequeathed, or conveyed by her the same as if she were a *feme sole;* and the same shall not be subject to the debts of her husband."

4945. "The property, both real and personal, which any married woman now owns, or has had conveyed to her by any person in good faith and without prejudice to existing creditors, or which she may have acquired as her sole and separate property; that which comes to her by gift, bequest, descent, grant, or conveyance from any person; that which she has acquired by her trade, business, labor, or services carried on or performed on her sole or separate account; that which a married woman in this state holds or owns at the time of her marriage, and the rents, issues, and proceeds of all such property, shall, notwithstanding her marriage, be and remain her sole and separate property, and may be used, collected, and invested by her, in her own name, and shall not be subject to the interference or control of her husband or liable for his debts, except such debts as may have been contracted for the support of herself or her children by her as his agent."

4946. "A married woman may bargain, sell, assign, and transfer her separate personal property, and carry on any trade or business, and perform any labor or services on her sole and separate account; and the earnings of any married woman, from her trade, business, labor, or services, shall be her sole and separate property, and may be used or invested by her in her own name; and she may alone sue or be sued in the courts of this state on account of the said property, business, or services."

4949. "In an action brought or defended by any married woman, in her name, her husband shall not, neither shall his property, be liable for the costs thereof, or the recovery therein. In an action brought by her for an injury to her person, character, or property, if judgment shall pass against her for costs, the court in which the action is pending shall have jurisdiction to enforce payment of such judgment out of her separate estate or property."

5641: "Where a married woman is a party, her husband must be joined with her, except in the following cases:

"First. She may be sued alone upon contracts made by her in

respect to her sole and separate property, or in respect to any trade or business carried on by her under any statute of this state.

"Second. She may maintain an action in her own name for or on account of her sole or separate estate or property, or for damages against any person or body corporate for any injury to her person, character, or property. * * * *

"Third. Where the action is between herself and her husband she may sue and be sued alone."

The particular point before us may not have been passed on by the supreme court of Arkansas, but that tribunal has recognized this legislation as intended for the protection of the wife's property against the husband's creditors, and has held that the earnings of a married woman arising from labor or services done and performed on her sole account become her separate property. Sellmeyer v. Welch, 47 Ark. 485, 1 S. W. 777; Rudd v. Peters, 41 Ark. 177; Hoffman v. McFadden, 56 Ark. 217, 19 S. W. 753.

Granting that the statutes have not deprived the husband of the services of the wife in the household, in the care of the family, or in and about his business, yet they have bestowed on her, independent of him, her earnings on her own account, and given her authority to acquire them. They proceed upon the difference between the discharge of marital duties and independent labor.

As the results of her earning capacity when exerted for herself belong to her, deprivation of that capacity must be to that extent her individual loss. The husband may recover for loss of services belonging to him, but not for loss of the wife's potentiality to earn for herself, nor for her expectation of life in that connection; and if he cannot, she can.

The precise question arose under statutory provisions not materially different from those in Arkansas, in Harmon v. Old Colony R. Co. 165 Mass. 100, 30 L. R. A. 658, 42 N. E. 505; and it was decided that in an action by a married woman to recover damages for a personal injury, the impairment of her capacity to perform labor might be considered as an element of the damages. The reasoning of the opinion seems to us so convincing that we quote from it at length.

The supreme judicial court, after referring to the statutes of 1846, 1855, 1857, and 1874, said:

"By virtue of this legislation a married woman becomes, in the view of the law, a distinct and independent person from her hus-

band, not only in respect to her right to own property, but also in respect to her right to use her time for the purpose of earning money on her sole and separate account. She may perform labor, and is entitled to her wages or earnings. If she complies with the statutory requirement as to recording a certificate, she may carry on any trade or business on her sole and separate account, and take the profits, if profits there are, as her separate property. Her right to enter into contracts, to earn money, to engage in performing labor or service, to enter into trade on her own account, is inconsistent with the view that her capacity to labor belongs exclusively to her husband. He can appropriate neither her earnings nor her time. Her right to employ her time for the earning of money on her own account is as complete as his; subject to the requirement of recording a certificate in case she enters into trade. This may interfere with his right to and enjoyment of her society and services. But this is a consequence which the legislature must be deemed to have foreseen and intended. His right in these respects is now made subordinate to her right to employ her time in the care and management of her property, and in the earning of money by performing labor or by carrying on a trade or business. So far as the statutes have given to her the right to act independently of him, so far his rights and control in respect to her are necessarily abridged. He can no longer compel her to work for him during such time as she may choose to to perform labor on her sole and separate account. By the common law the husband was bound to support his wife, and therefore was entitled to her services. By the statutes which modify the common law, his right to her services is abridged, though his obligation to support her remains. It is urged in argument that she may contract to devote her whole time to work which is to be performed away from his home, and which perhaps may require her absence for ten years, thus amounting to a desertion, which would be in violation of her matrimonial duties. But the possibility of extreme cases should not conclusively determine the construction of statutes, nor do we now decide whether the statutes would permit such action on her part against his consent. To a certain limited extent, as, for example, in fixing the domicil, and in being responsible under ordinary circumstances for its orderly management, the husband is still the head of the family. But in some particulars a married woman is now independent of her husband's control. In the case now before us, the impairment of the plaintiff's capacity to labor

was an element which might be considered by the jury in the estimate of her damages. In respect to this, as with other elements of damages, no close approximation to mathematical accuracy can in all cases be reached. In some instances, the right of a married woman to perform labor for others may have no money value. How much, if anything, should be allowed on this ground must be left to the jury to determine, under the circumstances of each particular case." * * * *

We find no reversible error, and the *judgment is affirmed.*[1]

[1] In Southern Ry. Co. v. Crowder, 135 Al. 417, 33 So. 335 (1902), the court said: "There is no inconsistency growing out of the statute conferring on the wife property rights, and the right to earnings arising from her labor and services, with her duties to her husband in the marital and domestic relations. There is no reason why both should not consist together in perfect harmony. In regard to the statement of counsel for appellant that the wife might include in her claim for damages loss of earning capacity, we see no reason why this should not be a legitimate claim, to the extent of her earning capacity in performing services for others than her husband or members of his family, since for such services she could contract for compensation. Nor can we see why expenses actually paid or incurred by her on account of the injuries received might not also become a legitimate claim in a suit by her. Of course, she could not recover such expenses if paid or incurred by the husband. Nor could she recover for loss of capacity to render service to the husband in their domestic relation, for the reason that such service is a duty growing out of their marriage relation, and for which she could not contract for or demand compensation. If the effect of the decision of the Massachusetts court be such as counsel contend for, it is opposed to the better reasoning employed in the decisions of other courts, and from which we have quoted. Our statute on this subject (Code, § 2521) reads as follows: "The earnings of the wife are her separate property; but she is not entitled to compensation for services rendered to or for her husband, or to or for the family." Our conclusion is that the statute does not effect the reciprocal duties of husband and wife, growing out of the married state, within their domestic relations, and that the husband has a marital right to the wife's services to himself and to the family, and for the loss of which, when caused by the wrongful act of another, he has his right of action in damages as against such wrongdoer. So, likewise, for the loss to him of the companionship of his wife, resulting from the wrong and injury to her. His relation as husband imposes upon him the duty of providing for and taking care of his wife, and any and all expenses paid or incurred by him on account of injuries received by her are recoverable as an element of damages sustained by him."

HUCHTING v. ENGEL.

(17 Wis. 230.—1863.)

HUCHTING brought an action before a justice of the peace against Moritz Engel, for breaking and entering the plaintiff's premises, and breaking down and destroying his shrubbery and flowers therein standing and growing. The plaintiff proved the alleged trespass and damages; and on the part of the defense it was shown that the defendant, at the time of the trespass, was but little more than six years old. A motion to dismiss the action on the ground that the defendant was "of such tender years that a suit at law could not be maintained against him," was overruled.

The justice rendered judgment against the defendant for $3.00 damages, with costs. The Circuit Court, on appeal, reversed the judgment; and the plaintiff sued out his writ of error.

DIXON, C. J. "Infants are liable in actions arising *ex delicto*, whether founded on positive wrongs, as trespass or assault, or constructive torts or frauds." 2 Kent's Com. 241.

"Where the minor has committed a tort with force, he is liable at any age; for in case of civil injuries with force, the intention is not regarded; for in such a case a lunatic is as liable to compensate in damages as a man in his right mind." Reeve's Dom. Rel. 258.

"The privilege of infancy is purely protective, and infants are liable to actions for wrong done by them; as to an action for slander, an action of trover for property embezzled, or an action grounded on fraud committed." Macpherson on Infants, 481 (41 Law Lib. 305).

"Infants are liable for torts and injuries of a private nature; as disseizins, trespass, slander, assault, etc." Bingham on Infancy, 110.

"All the cases agree that trespass lies against an infant." Hartfield v. Roper, 21 Wend. 620.

This is the language of a few of the many writers and courts who have spoken upon the subject. All agree, and all are supported by the authorities, with no single adjudged case to the contrary. Jennings v. Rundall, 8 Term. 335; Sikes v. Johnson, 196 Mass. 389; Homer v. Thwing, 3 Pick. 492; Campbell v. Stakes, 2 Wend. 137;

Bullock v. Babcock, 3 Wend. 391; Neal v. Gillett, 23 Conn. 437; Humphrey v. Douglass, 10 Vt. 71. In the latter case the minor was held answerable for a trespass committed by him, although he acted by command of his father.

The authorities cited by the counsel for the defendant in error have no bearing upon the question. They relate to the criminal responsibility of infants; to the question of negligence on their part, as whether it can be imputed to them so as to defeat actions brought by them to recover damages for personal injuries sustained in part in consequence of the negligence or unskillfulness of others; and to the liability of parents and guardians for wrongs committed by infants under their charge, by reason of the neglect or want of proper care of such parents or guardians. The case at bar is none of these. The defendant is not prosecuted criminally, the action is not brought by him to recover damages for personal injury occasioned by the joint negligence of himself or his parents, and another; nor is the liability of the parents involved. The suit is brought to recover damages for a trespass committed by him; not vindictive or punitory damages but compensation; and for that he is clearly liable. If damages by way of punishment were demanded, undoubtedly his extreme youth and consequent want of discretion would be a good answer.

Judgment of the circuit reversed, and that of the justice of the peace affirmed.

HARVEY v. DUNLOP.

(Reported. *Supra*, p, 128.)

RICE v. BOYER.

(108 Ind. 472; 9 N. E. 420.—1886.)

ELLIOTT, C. J. * * * The material and controlling question in the case is this: Will an action to recover the actual loss sustained by a plaintiff lie against an infant who has obtained property on the faith of a false and fraudulent representation that he is of full age?

It is evident from this brief reference to the authorities, that it is not easy to extract a principle that will supply satisfactory reasons for the solution of the difficulty here presented. It is to be expected that we should find, as we do, stubborn conflict in the authorities as to the question here directly presented, namely, whether an action will lie against an infant for falsely representing himself to be of full age. Johnson v. Pie, 1 Lev. 169; Price v. Hewitt, 8 Exch. 146; Liverpool, etc., Ass'n v. Fairhurst, 9 Exch. 422; Brown v. Dunham, 1 Root, 272; Curtin v. Patton, 11 Serg. & R. 305; Homer v. Thwing, 3 Pick. 492; Word v. Vance, 1 N. & McC. 197; Fitts v. Hall, 9 N. H. 441; Norris v. Vance, 3 Rich. 164; Gilson v. Spear, 38 Vt. 311.

Our judgment, however, is that where the infant does fraudulently and falsely represent that he is of full age, he is liable in an action *ex delicto* for the injury resulting from his tort. This result does not involve a violation of the principle that an infant is not liable where the consequence would be an indirect enforcement of his contract, for the recovery is not upon the contract, as that is treated as of no effect; nor is he made to pay the contract-price of the article purchased by him, as he is only held to answer for the actual loss caused by his fraud. In holding him responsible for the consequences of his wrong, an equitable conclusion is reached and one which strictly harmonizes with the general doctrine that an infant is liable for his torts. Nor does our conclusion invalidate the doctrine that an infant has no power to deny his disability, for it concedes this, but affirms that he must answer for his positive fraud.

Our conclusion that an infant is liable in tort for the actual loss resulting from a false and fraudulent representation of his age, is well sustained by authority, and it is strongly entrenched in principle, although, as we have said, there is a fierce conflict. It has been sanctioned by this court, although, perhaps, not in a strictly authoritative way, for it was said by Worden, J., speaking for the court, in Carpenter v. Carpenter, *supra*, that, "The false representation by the plaintiff, as alleged, that he was of full age, does not make the contract valid, nor does it estop the plaintiff to set up his infancy in avoidance of the contract; although it may furnish ground of an action against him for the tort. See 1 Parsons, Cont. 317; 2 Kent's Com. (12th ed.) 241."

The reasoning of the court in the case of Pittsburgh, etc., R. W.

Co. v. Adams, 105 Ind. 151, tends strongly in the same direction.

In Neff v. Landis, 110 Pa. 204, 1 Atl. R. 177, it was said: "It cannot be doubted that a minor who, under such circumstances, obtains the property of another, by pretending to be of full age and legally responsible, when, in fact, he is not, is guilty of a fraud by false pretense, for which he is answerable under the criminal law. 2 Whart. Crim. Law, 2099." If it be true, as asserted in the case from which we have quoted, that an infant who falsely and fraudulently represents himself to be of full age is amenable to the criminal law, it must be true, that he is responsible in an action of tort to the person whom he has wronged. The earlier English cases were undoubtedly against our conclusion, but the later cases seem to take a different view of the question. * * * *

It is laid down as a general rule by all the text-writers, that infants are liable for their torts, but many of these writers, when they come to consider such a question as we have here, are sorely perplexed by the early English decisions, and, by subtile refinement, attempt to discriminate between pure torts and torts connected with contracts, and to create an artificial class of actions. Their reasoning is not satisfactory. Aside from mere personal torts, it is scarcely possible to conceive a tort not in some way connected with a contract, and yet all the authorities agree that the liability of infants is not confined to mere personal torts. There is a connection between a contract and a tort in every case of bailment, of the bargain and sale of personal property and of the purchase and sale of real estate, and if an infant is not responsible for his fraudulent representation of his age, in connection with such transactions, there is not within the whole range of business transactions any case in which he could be made liable for his fraud. There are many cases, far too numerous for citation, where there is some connection between the contract and the tort, and yet it is unhesitatingly held that the infant is liable for his tort. Cooley, Torts, 112, auth. cited in notes. The cases certainly do agree; it is, indeed, difficult, if not impossible, to perceive how it could be otherwise, that, although there may be some connection between the contract and the wrong, the infant may be liable for his tort. It seems to us that the only logical and defensible conclusion is, that he is liable, to the extent of the loss actually sustained, for his tort where a recovery can be had without giving effect to his contract. The test, and the only satisfactory test, is supplied by the answer to the question: Can the

infant be held liable without directly or indirectly enforcing his promise? There is no enforcement of a promise where an infant who has been guilty of a positive fraud is made to answer for the actual loss his wrong has caused to one who has dealt with him in good faith and has exercised due diligence. Nor does such a rule open the way for a designing man to take advantage of an infant, for it holds him to the exercise of good faith and reasonable diligence, and does not enable him to make any profit out of the transaction with the infant, because it allows him compensation only for the actual loss sustained. It does not permit him to make any profit out of an executory contract, but it simply makes good his actual loss. * * * *

We are unwilling to sanction any rule which will enable an infant who has obtained the property of another, by falsely and fraudulently representing himself to be of full age, to enjoy the fruits of his fraud, either by keeping the property himself or selling it to another, and when asked to pay its just and reasonable value successfully plead his infancy. Such a rule would make the defense of infancy both a shield and a sword, and this is a result which the principles of justice forbid, for they require that it should be merely a shield of defense.

Judgment reversed with instructions to overrule the demurrer to the complaint.

SLAYTON v. BARRY.

(175 Mass. 513; 56 N. E. 574.—1900.)

MORTON, J. The declaration in this case is in two counts. The second count is in trover for the goods described in the first count. The first count alleges, in substance, that the defendant, intending to defraud the plaintiff, deceitfully and fraudulently represented to him that he was of full age, and thereby induced the plaintiff to sell and deliver to him the goods described, and, though often requested, had refused to pay for or return the goods, but had delivered them to persons unknown to the plaintiff. The case is here on exceptions to the refusal of the presiding judge to give certain instructions requested by the plaintiff and to his ruling ordering a verdict for the defendant. The question is whether the plaintiff

can maintain his action. He could not bring an action of contract, and so has brought an action of tort.

The precise question presented has never been passed upon by this court. Merriam v. Cunningham, 11 Cush. 40, 43. In other jurisdictions it has been decided differently by different courts. We think that the weight of authority is against the right to maintain the action. Johnson v. Pie, 1 Lev. 169, 1 Sid. 258, 1 Keb. 905; Grove v. Neville, 1 Keb. 778; Jennings v. Rundall, 8 Term R. 335; Green v. Greenbank, 2 Marsh. 485; Price v. Hewett, 8 Exch. 146; Wright v. Leonard, 11 C. B. (N. S.) 258; De Roo v. Foster, 12 C. B. (N. S.) 272; Gilson v. Spear, 38 Vt. 310; Nash v. Jewett, 61 Vt. 501, 18 Atl. 47, 4 L. R. A. 561; Ferguson v. Bobo, 54 Miss. 121; Brown v. Dunham, 1 Root, 272; Geer v. Hovey, Id. 179; Wilt v. Welsh, 6 Watts, 9; Burns v. Hill, 19 Ga. 22; Kilgore v. Jordan, 17 Tex. 341; Benj. Sales (6th Ed.) 23; Cooley, Torts (2d Ed.) 126; 2 Add. Torts, § 1314. See, contra, Fitts v. Hall, 9 N. H. 441; Eaton v. Hill, 50 N. H. 235; Hall v. Butterfield, 59 N. H. 354; Rice v. Boyer, 108 Ind. 472, 9 N. E. 420; Wallace v. Morss, 5 Hill, 391.

The general rule is, of course, that infants are liable for their torts. Sikes v. Johnson, 16 Mass. 389; Homer v. Thwing, 3 Pick. 492; Shaw v. Coffin, 58 Me. 254; Vasse v. Smith, 6 Cranch, 226, 3 L. Ed. 207. But the rule is not an unlimited one. It is to be applied with due regard to the other equally well settled rule, that, with certain exceptions, they are not liable on their contracts; and the dominant consideration is not that of liability for their torts, but of protection from their contracts. The true rule seems to us to be as stated in Association v. Fairhurst, 9 Exch. 422, 429, where it was sought to hold a married woman for a fraudulent misrepresentation, namely: If the fraud "is directly connected with the contract, * * * and is the means of effecting it, and parcel of the same transaction," then the infant will not be liable in tort. The rule is stated in 2 Kent, Comm. (8th Ed.) § 241, as follows: "The fraudulent act, to charge him [the infant], must be wholly tortious; and a matter arising *ex contractu*, though infected with fraud, cannot be changed into a tort in order to charge the infant in trover or case by a change in the form of the action."

In the present case it seems to us that the fraud on which the plaintiff relies was part and parcel of the contract, and directly connected with it. The plaintiff cannot maintain his action without showing that there was a contract, which he was induced to enter

into by the defendant's fraudulent representations in regard to his capacity to contract, and that pursuant to that contract there was a sale and delivery of the goods in question. Whether, as an original proposition, it would be better if the rule were as laid down in Fitts v. Hall, *supra,* and Hall v. Butterfield, *supra,* in New Hampshire, and Rice v. Boyer, *supra,* in Indiana, we need not consider. The plaintiff relies on Homer v. Thwing, *supra;* Badger v. Phinney, 15 Mass. 359; and Walker v. Davis, 1 Gray, 506. In Walker v. Davis, *supra,* there was no completed contract, and the title did not pass. The sale of the cow by the defendant operated, therefore, clearly, as a conversion. Badger v. Phinney, *supra,* was an action of replevin; and it was held that the property had not passed, or if it had, that it had revested in the plaintiff in consequence of the defendant's fraud. The plaintiff maintained his action independently of the contract. In Homer v. Thwing, *supra,* the tort was only incidentally connected with the contract of hiring.

We think that the exceptions should be overruled. So ordered.

KUMBA v. GILHAM.

(103 Wis. 312; 79 N. W. 325.—1899.)

Action by Philip Kumba against William Gilham for negligence of defendant's son. A verdict for plaintiff was set aside, and a new trial granted. Thereupon a verdict for defendant was directed, and plaintiff brings error. Affirmed.

The defendant on a Wednesday or Thursday in November hired from a liveryman a team to send for his daughter; asking for a quiet team, as he wanted to send his son, about 14 years old. He at the same time notified the liveryman that he should want a team on Sunday to take his daughter back to her school. The son went, and brought home his sister. On Saturday the father telephoned the liveryman that he would not send his son back with the sister, as it was too cold, but would go himself, and directed him to send the team to his (the father's) meat market at 9 o'clock Sunday morning. On Sunday morning one Poronto, who was teaching school in the same vicinity as the defendant's daughter, went to the livery stable, and said that he would take the team which defend-

ant had ordered, as he had arranged to ride out with them, and that the son would go with them and bring the team back. He was accordingly given the team by the liveryman, went to defendant's house, got the son and daughter, and started off, all without any knowledge or consent on the part of the defendant, who, being disappointed by the nonarrival of the team at his market, telephoned to the liveryman, and learned that Poronto had called for it, whereupon he hastened to his house in order to prevent his son's going, but was too late; the party being a mile away by that time. On the way back the young man experienced an accident, the front wheels coming out from under the buggy and breaking the kingbolt, when he was still about 10 miles from home. He thereupon ran the buggy just as far out on the side of the road as he could, so that the nearest part of it was somewhere from 9 to 12 feet from the nearest traveled track, and went home without it. On his son's arrival the defendant telephoned the liveryman of the fact of the breakdown, and inquired if the liveryman would send for the disabled buggy, or wished him (the father) to do so. The liveryman said he would. On the Wednesday following, the plaintiff, driving a span of horses which he had had four or five weeks, and which he testified were well broken and gentle, but which numerous other witnesses testified were skittish, and one of them greatly given to shying and wheeling out of the road at any unusual object, was driving on the road where the buggy was. It had been changed from its natural posture, right side up, in which the son left it, so that the dashboard was up in the air and the top rested down on the ground. The horses shied and threw plaintiff out, and then ran away, causing some damage. It was proved that the buggy was of the most ordinary type, such as was commonly driven throughout that neighborhood. The liveryman estimated that there were a thousand practically like it in Wausau, and that nearly every farmer had one. A verdict was rendered for the plaintiff upon the first trial, which the court set aside, granting a new trial. Upon the second trial the court ordered a verdict for the defendant. Appellant assigns as error both the granting of a new trial and the ordering of a verdict for the defendant on the second trial.

DODGE, J. The primary question of law here presented is whether the defendant is liable for the acts of his son, assuming them to be

negligent. As to this question the facts are without dispute. The law is well settled that no general liability of the father for torts of a minor son exists. Such liability in general results only from the rule of *respondeat superior* when the fact of agency for the father is proved, and no presumption of agency results from the domestic relationship. 17 Am. & Eng. Enc. Law, p. 392; Schouler, Dom. Rel. § 263; Schaefer v. Osterbrink, 67 Wis. 495, 30 N. W. 922; Winkler v. Fisher, 95 Wis. 355, 70 N. W. 477; Moon v. Towers, 8 C. B. (N. S.) 611. True, it is said in Schaefer v. Osterbrink that, where an injury is caused by a minor in driving his father's team upon the father's business, it may suffice to show that such acts have been customarily done in the presence and with the knowledge of the father; but this rule bears only on sufficiency of the proof of the agency or authority, and has no application to the present case.

Again, there is a line of cases sustaining liability for acts done in the father's presence, Strohl v. Levan, 39 Pa. St. 177, or where acts are done by very young children on the father's premises, likely to frighten passing teams, and it was shown that similar conduct had been customtary, to the father's knowledge. Hoverson v. Noker, 60 Wis. 511, 19 N. W. 382. These cases are predicated on the assumed power of control by a parent over his children, and the latter upon the responsibility of one who maintains on his premises anything known to be dangerous, or having a tendency to injure others. But, apart from these exceptional aspects of the question, proof is essential of the conferring of authority to do something for the father, within the scope of which is the tort alleged; and, as Mr. Schouler sums up the subject, it is always a defense to show that the parent was not able to prevent the act complained of. It is not sufficient that the child was engaged in some undertaking beneficial to the father, or which he desired to have accomplished, unless such engagement be in accordance with directions or authority from the father. Winkler v. Fisher, *supra;* Moon v. Towers, *supra.*

In the case at bar there is a complete absence of any contact of the father with the transaction, in the way of instruction, authorization, or even interest in the enterprise, further than the mere fact that an object which he (the father) desired was being accomplished, namely, the transportation of the daughter to her school. But this purpose was not being accomplished in the manner desired by the father, nor in accordance with any instructions or authority from him. His plan was to hire a different team, and drive his

daughter out himself, being unwilling that the son should go. That purpose, without his consent and beyond his control, was interrupted and modified to suit the convenience of a third person, Poronto, who desired to travel to the same vicinity, and who obtained from the liveryman the team in question. True, he said he desired to take the team which had been ordered by the defendant, but no authority or even knowledge on the defendant's part is shown. The team, of course, had to be brought back, and the son went for that purpose; but the father did not authorize it, and would have prevented it, had it been within his power. It is hardly possible, therefore, to say even that the son was engaged upon business of the father. Quite as much was he engaged upon the business of Poronto. Even if it can be said that the son was in charge of the father's team,—a proposition in much doubt,—he clearly was not so in charge by any authority or consent, but, on the contrary, against the wishes and beyond the control, of the father. The suggested acts of ratification are wholly insufficient to accomplish that result. They consist merely in an inquiry of the liveryman as to whether he would go after the disabled buggy, or wished defendant to. This was after the event, when the defendant had no control over the matter, when he could not undo what had been done; and the words are not significant of approval of that which had been done without his consent, and which he would have prevented if he could. Heath v. Paul, 81 Wis. 532, 538, 51 N. W. 876. * * * *

Judgment affirmed.

McGARR v. NATIONAL & PROVIDENCE WORSTED MILLS.

(24 R. I. 447; 53 At. 829.—1902.)

TILLINGHAST, J. This is an action of trespass on the case for negligence, and is brought to recover damages for the loss of service of the plaintiff's minor daughter, Sarah McGarr, and also to recover for the expenses incurred by the plaintiff for medicines, medical attendance, and nursing, occasioned by reason of personal injuries sustained by said Sarah while in the employ of the defendant corporation. Said Sarah McGarr, by her father and next

friend, Owen McGarr, had previously brought suit against the defendant to recover damages for personal injuries growing out of the accident in question (see 22 R. I. 347, 47 Atl. 1092), and had obtained a substantial verdict therein; and thereafterwards the mother, Annie McGarr, brought this action to recover for the consequential damages suffered by herself on acount of said injuries to her daughter, and upon trial thereof a verdict was rendered in her favor for the sum of $9,500.

The case is now before us upon the defendant's petition for a new trial upon the grounds (1) that the verdict is against the law and the evidence; (2) that the presiding justice erred in admitting certain evidence against the objection of the defendant, and also erred in refusing to admit certain evidence offered by the defendant; (3) that the presiding justice also erred in his instructions to the jury; and (4) that the damages awarded by the jury were excessive and unjust. At the trial of the case all of the questions involved, including the question of the defendant's negligence, were considered as fully as if there had been no prior verdict and judgment in favor of the daughter, Sarah McGarr. The proof shows that she was employed by the defendant as a spinner, and at the time of the accident, January 6, 1899, was engaged in tending a spinning frame in No. 6 mill of the defendant company. The spinning frame was run by an overhead belt some ten feet from, and substantially parallel with, the floor. The claim of the plaintiff is that this belt, by reason of its improper and insufficient lacing, suddenly broke, and that one end of it struck her daughter upon the side of her head, inflicting severe injuries, from which major hysteria developed, together with other physicial ailments of a very serious and permanent nature. Owen McGarr, the father of Sarah and the husband of the plaintiff, died on November 5, 1900.

Defendant's counsel starts out with the broad contention that the action will not lie, on the ground that the plaintiff, as the mother of said Sarah, is not entitled to maintain it: First, because she was not bound to support her child, Sarah; and, second, because the right of action for loss of service, having become vested in the father during his lifetime, could not become devested and vest in the mother after his death. Having taken this position at the jury trial, the defendant objected to the introduction of any testimony as to damages. And as the trial court overruled this objection, sub-

ject to exception by the defendant, the first question which logically presents itself is whether the action will lie.

1. That at the common law the father is entitled to the benefit of his minor children's labor while they live with him and are supported by him, there can be no doubt. His right to their services, like his right to their custody, rests upon the parental duty of maintenance, and is said to furnish some compensation to him for his own services rendered to the child. Schouler, Dom. Rel. (5th Ed.) § 252; Brown v. Smith, 19 R. I. 319, 33 Atl. 466, 30 L. R. A. 680. The mother, on the other hand, not being thus bound for the maintenance of her minor children, has no implied right, at the common law, to their services and earnings. The common-law doctrine as thus briefly stated, however, has been greatly relaxed by modern decisions in this country, if not in England; and the strong tendency of the courts in this country, as well stated by FIELD, C. J., in Horgan v. Mills, 158 Mass. 402, 33 N. E. 581, 35 Am. St. Rep. 504, "is to give to a widow left with minor children, who keeps the family together and supports herself and them with the aid of their services, very much the same control over them and their earnings during their minority, and to impose on her, to the extent of her ability, much the same civil responsibility for their education and maintenance, as are given to and imposed on a father." The chief justice then stated the opinion of the court in that case to be as follows: "We are of opinion that when a minor child lives with its mother, who is a widow, and the child is supported by the mother, and works for her as one of the family, the mother is entitled to recover for the loss of services of the child, and for labor performed and expenses reasonably incurred in the care and cure of the child, so far as they are the consequences of an injury to the child negligently caused by the defendant."

This statement of the law is abundantly supported by the authorities cited in the opinion, and by numerous others which might be added. See 17 Am. & Eng. Enc. Law (1st Ed.) p. 387, and cases collected in notes 1 and 2; Drew v. Railroad Co., 26 N. Y. 49, McElmurray v. Turner, 86 Ga. 215, 12 S. E. 359; 2 Kent, Comm. 205, 206; Nightingale v. Withington, 15 Mass. 274, 8 Am. Dec. 101; Railroad Co. v. Cook, 63 Miss. 38; Commissioners v. Hamilton, 60 Md. 340, 45 Am. Rep. 739; Kennedy v. Railroad Co., 35 Hun, 186; Moritz v. Garnhart, 7 Watts, 302, 32 Am. Dec. 762; Furman v.

Van Sise, 56 N. Y. 435, 15 Am. Rep. 441; Matthews v. Railway Co., 26 Mo. App. 75.

2. It being well settled, then, that a widow may maintain an action for loss of services of her minor child, the next question which arises is whether the plaintiff can maintain her action, the cause of which accrued prior to the death of her husband. The answer to this question, in so far as it relates to the plaintiff's right to recover for loss of service, etc., prior to the death of the father, depends primarily upon the relation which existed between the mother and daughter at the time of the accident as to the right of service; that is, whether the mother or the father of the girl at that time was legally entitled to her services. And as the father was presumably entitled thereto, it devolves upon the plaintiff to prove that he had in some way relinquished his right or conferred it upon her. While the right to the child's services is naturally in the father, he can doubtless surrender this right to another by contract or otherwise, in various ways, as (a) by binding the child as an apprentice Ames v. Railroad Co., 117 Mass. 541, 19 Am. Rep. 426; (b) by allowing another person to so act that he stands *in loco parentis* Whitaker v. Warren, 60 N. H. 26, 49 Am. Rep. 302. This principle is fully recognized in Morse v. Welton, 6 Conn. 547, 16 Am. Dec. 73, where it was held that the right of a parent to the services of his minor children "is bottomed on his duty to maintain, protect, and educate them. * * * But this right and this duty may be transferred to another, and may be relinquished to a child." The law doubtless is, however, that the father cannot permanently transfer his rights and duties to another, except by deed. State v. Libbey, 44 N. H. 321, 82 Am. Dec. 223.

The testimony upon which the plaintiff relies to show that the services of Sarah belonged to her at the time of the accident is to the effect that the plaintiff is, and long has been, the real head of the family; that she owns the property, takes care of the family, and pays the bills; and that, by express direction from the father in his lifetime, she was entitled to, and did, receive all of the earnings of the daughter, Sarah. She employed the physician who has attended the daughter since the accident, and is personally responsible to him for his services. Dr. O'Keefe testifies that he rendered his services at the request of the mother; that the night he was called he saw the case would be prolonged, and he had a talk with the mother, and she told him she wanted him to attend her daughter,

and would see him paid; and that his services have been charged to her. The testimony further shows that the father had no property, and no income except his current earnings. In view of this state of the proof, plaintiff's counsel contends that the wages of Sarah were the property of the mother, for the recovery of which she could have maintained an action. In other words, the contention is that the arrangement and understanding between the father and mother of Sarah as to her wages, taken in connection with the other facts aforesaid, amounted to a relinquishment by the father of his right to the daughter's services and earnings and an assignment thereof to the mother, and hence that the latter can recover for the loss thereof. We think this is so. It is true, the evidence fails to show the making of any formal agreement between the plaintiff and her husband as to the child's services and earnings; but as it appears that there was an understanding between them to the effect that they belonged to the mother, and as it also appears that the mother managed the affairs of the family, owned the property, and contracted and paid the bills, we think this is sufficient to entitle her to maintain the action, not only for loss of services, etc., since the death of the father, but also prior thereto. If the case were one which simply showed the payment to the mother of the child's wages by direction of the father, we should not deem this sufficient to enable the mother to maintain an action of this sort, as it is matter of common knowledge that for prudential and other reasons this is frequently done. But where, as in the case at bar, there is other evidence which, taken in connection with this, shows a relinquishment by the father of his right to the child's services, and an assumption of his duties to the child by the mother, then she can maintain the action.

In a leading New York case upon assignment of claim by husband to wife, the wife was allowed to collect, in an action for the recovery of the value of services, for work and labor done by plaintiff's husband and assignor for the defendant. In rendering its opinion, the court said: "The defendant contends that the plaintiff's title to the claim in suit is invalid because acquired by assignment directly from the husband. While a different rule might prevail if the rights of the husband's creditors were concerned, transfers of personalty made by husband to wife are sustained as valid between the parties, and choses in action are held to pass by delivery from one to the other without a written assignment." Seymour v. Fellows, 44 N. Y. Sup. Ct. 126. This case was affirmed upon an appeal in an opinion

written by DANFORTH, J., who said: "The appellant objects that the assignment of the cause of action, having been made directly to the plaintiff by her husband, is void. The rights of creditors are not in question, and we think the court below properly overruled the objection." Seymour v. Fellows, 77 N. Y. 179. * * * An examination of the numerous cases bearing upon the general question involved shows that the consensus of opinion is to the effect that, in cases of wrongful injury, whoever, by reason of right or relationship, suffers consequential damage thereby, and may be liable for necessary expenses consequent upon such injury, is entitled to recover against the wrongdoer the amount of such damages and necessary expenses. The right of recovery is based both upon the right to service, and upon the liability to support and maintain the person injured, where the result of the injury may be to render the person injured a public charge. The right to such recovery, in so far as it is based upon the liability to support the person injured, rests upon the pauper statutes, so-called, beginning with the forty-third Elizabeth, which is as follows (chapter 2, § 7: "And be it further enacted that the father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame and impotent person, or other person not able to work, being of sufficient ability, shall, at their own charges, relieve and maintain every such poor person in that manner and according to that rate as by the justices of the peace of that county, where such person, sufficient persons dwell, or the greater number of them, at their general quarter sessions shall be assessed, upon pain that every one of them shall forfeit twenty shillings for every month which they shall fail therein." Our own pauper statute (Gen. Laws, c. 79, § 5) is a practical reenactment thereof, and is as follows: "Sec. 5. The kindred of any such poor person, if any he shall have, in the line or degree of father or grandfather, mother or grandmother, children or grandchildren, by consanguinity, or children by adoption, living within this state and of sufficient ability shall be holden to support such pauper in proportion to such ability." A number of courts have upheld the right of one standing *in loco parentis* to a child to recover for loss of services of such child, resting such right upon the liability of such person for the maintenance of the child under statutes similar to 43 Elizabeth. Thus in Moritz v. Garnhart, *supra,* the court said of a grandparent (and in that case it is pertinent to note that both the mother and putative father of the child were alive): "He is, indeed

not a parent, but is chargeable by the poor laws with the duty of one. The rights of a parent are pupillary, and, as they are given for the benefit of the child, the person, in the exercise of them must necessarily have a correlative remedy for their infraction." In Mathewson v. Perry, 37 Conn. 435, 9 Am. Rep. 339, the court said: "Our statute concerning the support of paupers by relatives imposes the obligation to provide for children alike on father and mother, making each liable if of sufficient ability. Gen. St. tit. 50, § 40. The provisions of this statute are taken substantially from the forty-third Elizabeth. If the right to receive the earnings of minor children, which is conceded to the father, be made to rest on the liability of the father for their support, the mother, having the same liability, should be entitled to the same right." See, also, Hammond v. Corbett, 50 N. H. 501, 9 Am. Rep. 288; Whitaker v. Warren, 60 N. H. 26, 49 Am. Rep. 302; Railroad Co. v. Jones, 21 Colo. 347, 40 Pac. 891.

The uncontradicted evidence in the case at bar shows that the plaintiff has supported, cared for, and nursed her said daughter, Sarah, since the happening of the accident in question, and also that she has lost the benefit of her services during all of said time. And we are of the opinion, and therefore decide, that, upon the facts and law as above stated, the rulings of the trial court, whereby the plaintiff was permitted to introduce evidence of loss of services, etc., from the date of the accident, were correct, and should be sustained.

The exceptions to such rulings are therefore overruled.

McKELVEY v. McKELVEY et al.

(111 Tenn. 388; 77 S. W. 664.—1903.)

BEARD, C. J. This is a suit instituted by a minor child, by next friend, against her father and stepmother, seeking to recover damages for cruel and inhuman treatment alleged to have been inflicted upon her by the latter at the instance and with the consent of the father. Upon demurrer the suit was dismissed, and, the case being properly brought to this court, error is assigned upon this action of the trial judge.

We think there was no error in this dismissal. At common law the right of the father to the control and custody of his infant child grew out of the corresponding duty on his part to maintain, protect, and educate it. These rights could only be forfeited by gross misconduct on his part. The right to control involved the subordinate right to restrain and inflict moderate chastisement upon the child. In case parental power was abused, the child had no civil remedy against the father for the personal injuries inflicted. Whatever redress was afforded in such case was to be found in an appeal to the criminal law and in the remedy furnished by the writ of *habeas corpus*. So far as we can discover, this rule of the common law has never been questioned in any of the courts of this country, and certainly no such action as the present has been maintained in these courts. It is true that no less celebrated an authority than Judge COOLEY, in the second edition of his work on Torts, at page 171, observes that "in principle there seems to be no reason why it should be sustained." No case, however, is cited in support of this text. In fact, the only case which the diligence of counsel has been able to find in which this particular question has been discussed is that of Hewlett v. George, Ex'r, reported in 68 Miss. 703, 9 South. 885, 13 L. R. A. 682. It is there said: "So long as the parent is under obligation to care for, guide, and control, and the child is under reciprocal obligation to aid and comfort and obey, no such action as this can be maintained. The peace of society, and of the families composing society, and of a sound public policy designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent. The state, through its criminal laws, will give the minor children protection from parental violence and wrongdoing, and this is all the child can be heard to demand."

The fact that the cruel treatment in this case was inflicted by a stepmother can make no difference, for, whether inflicted in the presence of the father or not, if the action could be maintained at all, he would be responsible for the tort. If inflicted in his presence, he alone would be responsible, nothing appearing to repel the presumption that it was the result of his coercion; if out of his presence, then he and she would be jointly liable for the wrong. So at last it comes back to the question as to the right of a minor child to institute a civil action against the father for wrongs inflicted upon it.

An analogy is furnished in the relation of husband and wife. It has been held that neither husband nor wife can maintain an action against the other for wrongs committed during coverture. This holding rests in part upon their unity by virtue of the marriage relation, which would preclude the one from suing the other at law, and in part upon the respective rights and duties involved in that relation. In Abbott v. Abbott, 67 Me. 304, 24 Am. Rep. 27, it was held that a wife could not, even after being divorced from her husband, maintain an action against him for an assault committed upon her during coverture, nor against persons who assisted him in making the assault. As was said by the court, at common law the husband was the guardian of the wife, and was bound to protect and maintain her, and on that ground "the law gave him a reasonable superiority and control over her person, authorizing him to put gentle restraints upon her liberty if her conduct were such as to require it." 2 Kent's Com. 180. In view of the evolution of the law in the amelioration of the married woman's condition and the comparative independence that was now secured to her, it was insisted in that case that the action should be maintained. To this, however, the court replied: "We are not convinced that it is desirable to have the law as the plaintiff contends it to be. There is no necessity for it. Practically the married woman has remedy enough. She has the privilege of the writ of *habeas corpus* if lawfully restrained. As a last resort, if need be, she can prosecute at her husband's expense a suit for divorce."

In Phillips v. Barnett, 1 Q. B. D. 436, the same rule is announced, although it was insisted there, as in the case from Maine, that, the marriage relation having ceased by divorce, the wife should be let in to her action for damages against the former husband for personal injuries inflicted upon her during coverture; the argument being that the relation simply suspended the right of action, and, this relation having been terminated, the right was then in a condition to be enforced. But it was there said, as in the first case, that the error in this insistence was in supposing that a right of action ever existed; that there was no civil remedy either during or after coverture, because there was no civil right to be redressed.[1]

[1] In Bandfield v. Bandfield, 117 Mich. 80, 75 N. W. 287, 40 L. R. A. 757 (1898), the plaintiff, after securing a divorce from the defendant sued him at law for damages, caused by a loathsome and incurable venereal disease communicated by him to her, during their marriage. Defendant's

We think that the circuit judge acted in obedience to a well-settled rule controlling the relation of father and child, and in furtherance of a sound public policy, in sustaining the demurrer to the declaration in this case, and his judgment is affirmed.

HERITAGE v. DODGE.

(64 N. H. 297.—1886.)

Trespass for assault and battery.

The plaintiff requested the following instruction: "If the jury find that the plaintiff could not help coughing by reason of a chin-cough, then the defendant was not justified in punishing him, although the defendant believed that the plaintiff coughed for the purpose of defying his authority and disobeying the rules of the school." Refusal and exception. Verdict for defendant.

SMITH, J. The instructions requested made the defendant liable, without regard to the fact whether he exercised reasonable judgment and discretion in determining whether the plaintiff was guilty of intentional misconduct as a scholar. The law clothes the teacher, as it does the parent in whose place he stands, with power to enforce discipline by the imposition of reasonable corporal punishment. * * * He is not required to be infallible in his judgment. He is the judge to determine when and to what extent correction is necessary; and like all others clothed with discretion, he cannot be made personally responsible for error in judgment when he has acted in good faith and without malice. Cooley, Const. Lim. 341; Cooley on Torts, 171, 172, 288; Lander v. Seaver, 32 Vt. 114; State v. Pendergrass, 2 Dev. & Bat. 365; Fitzgerald v. Northcote, 4 F. & F. 656; Reeve Dom. Rel. 288.

Exceptions overruled.

demurrer was sustained; the court declaring that in giving alimony to the plaintiff, in a divorce action, such an injury as this should be taken into account.

§ 3.—MASTER AND SERVANT.

HYDE v. COOPER.

(26 Vt. 552.—1854.)

Trespass for an ox. In this case an officer had sold property on execution without sufficient notice, and the plaintiff in the execution was sued on the theory that he had adopted the officer's tort. The only evidence of adoption was that before the sale he had expressed the opinion that the notice was sufficient, and that he received the money on the execution.

REDFIELD, Ch. J.

* * * * *

No doubt, if the officer takes the property of one man upon another's debt, or sells at private sale, and the creditor accepts the money, knowing the facts, he may be liable for the acts of the officer. But in such case the acts are not regarded as official. But it would scarcely be consistent, with sound reason, to apply the same rule to all the acts of an officer. It would be almost equivalent to exonerating the officer from all official responsibility.

The views here expressed are strongly confirmed, by the decision in the case of Abbott v. Kimball, 19 Vt. 551. As a general rule, perhaps, where the mistake is one of fact, and such as makes the officer a trespasser, and the party knowing all the facts, consents to take the avails of a sale, or where he counsels the very act which creates the liability of the officer, he is implicated, to the same extent as the officer. But when the party does not direct or control the course of the officer, but requires him to proceed at his peril, and the officer makes a mistake of law in judging of his official duty, whereby he becomes a trespasser, even by relation, the party is not affected by it, even when he receives money, which is the result of such irregularity, although he was aware of the course pursued by the officer. He is not liable, unless he consents to the officer's course, or subsequently adopts it. And if he does that he cannot maintain an action against the officer for doing the act, and the consequence would be, that if receiving the avails of a sale on execution were to be regarded, in all cases, as amounting to a ratification of the conduct of the officer in the sale, it must preclude the creditor from all suit against the officer on that account, which has never

been so regarded. The party may always take money, which the officer informs him he has legally collected, without assuming the responsibility of indorsing the perfect legality of the entire detail of the officer's official conduct in the matter.

For if the officer is compelled to refund to the debtor, on account of his irregularity of procedure, that will not affect the right of the creditor to retain the money. He is still entitled to retain the money against the officer. And the party cannot claim the money of the creditor without thereby affirming the sale. So that the creditor's accepting the amount of money for which the property sold, is no more a ratification of the conduct of the officer, than if he took the money of the officer on any other liability. The money is the officer's, whether he was a trespasser or not, and he is at all events liable to the creditor. If the sale was irregular, that is his loss, he must still pay the creditor, and accepting the money is but taking pay for the officer's liability to the creditor, for his default in the sale, if it was irregular. So that in any view of the case, there is no ground of implicating the defendant.

Judgment affirmed.

DEMPSEY v. CHAMBERS.

(154 Mass. 330.—1891.)

HOLMES, J. This is an action of tort to recover damages for the breaking of a plate-glass window. The glass was broken by the negligence of one McCullock while delivering some coal which had been ordered of the defendant by the plaintiff. It is found as a fact that McCullock was not the defendant's servant when he broke the window, but that the "delivery of the coal by [him] was ratified by the defendant, and that such ratification made McCullock in law the agent and servant of the defendant in the delivery of the coal." On this finding the court ruled "that the defendant, by his ratification of the delivery of the coal by McCullock, became responsible for his negligence in the delivery of the coal." The defendant excepted to this ruling, and to nothing else. We must assume that the finding was warranted by the evidence, a majority of the court being of the opinion that the bill of exceptions does not purport to

set forth all the evidence on which the finding was made. Therefore the only question before us is as to the correctness of the ruling just stated.

If we were contriving a new code to-day we might hesitate to say that a man could make himself a party to a bare tort in any case merely by assenting to it after it had been committed. But we are not at liberty to refuse to carry out to its consequences any principle which we believe to have been part of the common law simply because the grounds of policy on which it must be justified seem to us to be hard to find, and probably to have belonged to a different state of society.

It is hard to explain why a master is liable to the extent that he is for the negligent acts of one who at the time really is his servant, acting within the general scope of his employment. Probably master and servant are "feigned to be all one person" by a fiction which is an echo of the *patria potestas* and of the English frankpledge. Byington v. Simpson, 134 Mass. 169, 170; Fitzh. Abr. "Corone," pl. 428. Possibly the doctrine of ratification is another aspect of the same tradition. The requirement that the act should be done in the name of the ratifying party looks that way. New England Dredging Co. v. Rockport Granite Co., 149 Mass. 381, 382; Fuller & Trimwell's Case, 2 Leon. 215, 216; Sext. Dec. 5, 12; De Reg. Jur. Reg. 9; D. 43, 26, 13; D. 43, 16, 1, § 14, gloss., and cases next cited.

The earliest instances of liability by way of ratification in the English law, so far as we have noticed, were where a man retained property acquired through the wrongful act of another. Y. B. 30 Edw. I. 128 (Roll's ed.); 38 Lib. Ass. 223, pl. 9; S. C. 38 Edw. III. 18; 12 Edw. IV. 9, pl. 23. See Plowd. 8 *ad fin.* 27, 31; Bract. 158*b*, 159*a*, 171*b*. But in these cases the defendant's assent was treated as relating back to the original act, and at an early date the doctrine of relation was carried so far as to hold that, where a trespass would have been justified if it had been done by the authority by which it purported to have been done, a subsequent ratification might also justify it. Y. B. 7 Hen. IV. 34, pl. 1. This decision is qualified in Fitzh. Abr. "Bayllye," pl. 4, and doubted in Bro. Abr. "Trespass," pl. 86, but it has been followed and approved so continuously and in so many later cases that it would be hard to deny that the common law was as there stated by Chief Justice GASCOIGNE. Godb. 109, 110, pl. 129; 2 Leon. 199, pl. 246; Hull v. Pickersgill,

1 Brod. & B. 282; Muskett v. Drummond, 10 B. & C. 153, 157; Buron v. Denman, 2 Exch. 167, 188; Secretary of State v. Sahaba, 13 Moore, P. C. 22, 86; Cheetham v. Mayor, etc., L. R. 10 C. P. 249; Wiggins v. U. S., 3 Ct. Cl. 412.

If we assume that an alleged principal, by adopting an act which was unlawful when done can make it lawful, it follows that he adopts it at his peril, and is liable if it should turn out that his previous command would not have justified the act. It never has been doubted that a man's subsequent agreement to a trespass done in his name and for his benefit amounts to a command so far as to make him answerable. The *ratihabitio mandato comparatur* of the Roman lawyers and the earlier cases D. 46 3, 12, § 4; D. 43, 16, 1, § 14; Y. B. 30 Edw. I. 128,) has been changed to the dogma *æquiparatur* ever since the days of Lord COKE. (4 Inst. 317. See Bro. Abr. "Trespass," pl. 113, Co. Litt. 207*a*; Wing. Max. 124; Com. Dig. "Trespass," C, 1; Railway Co. v. Broom, 6 Exch. 314, 326, 327, and cases hereafter cited.

Doubts have been expressed, which we need not consider, whether this doctrine applied to a case of a bare personal tort. Adams v. Freeman, 9 Johns. 117, 118; Anderson and Warberton, JJ., in Bishop v. Montague, Cro. Eliz. 824. If a man assaulted another in the street out of his own head, it would seem rather strong to say that if he merely called himself my servant, and I afterwards assented, without more, our mere words would make me a party to the assault, although in such cases the canon law excommunicated the principal if the assault was upon a clerk. Sext. Dec. 5, 11, 23. Perhaps the application of the doctrine would be avoided on the ground that the facts did not show an act done for the defendant's benefit. Wilson v. Barker, 1 Nev. & M. 409, 4 Barn, & Adol. 614; Smith v. Lozo, 42 Mich. 6; as in other cases it has been on the ground that they did not amount to such a ratification as was necessary, Tucker v. Jerris, 75 Me. 184; Hyde v. Cooper, 26 Vt. 552.

But the language generally used by judges and text-writers, and such decisions as we have been able to find, is broad enough to cover a case like the present, when the ratification is established. * * * *

The question remains whether the ratification is established. As we understand the bill of exceptions, McCullock took on himself to deliver the defendant's coal for his benefit, and as his servant, and the defendant afterwards assented to McCullock's assumption. The ratification was not directed specifically to McCullock's tres-

pass, and that act was not for the defendant's benefit, if taken by itself, but it was so connected with McCullock's employment that the defendant would have been liable as master if McCullock really had been his servant when delivering the coal. We have found hardly anything in the books dealing with the precise case, but we are of opinion that consistency with the whole course of authority requires us to hold that the defendant's ratification of the employment established the relation of master and servant from the beginning, with all its incidents, including the anomalous liability for his negligent acts. See Coomes v. Houghton, 102 Mass. 211, 213, 214; Cooley, Torts, 128, 129. The ratification goes to the relation, and establishes it *ab initio*. The relation existing, the master is answerable for torts which he has not ratified specially, just as he is for those which he has not commanded, and as he may be for those which he has expressly forbidden. In Gibson's Case, Lane, 90, it was agreed that if strangers, as servants to Gibson, but without his precedent appointment, had seized goods by color of his office, and afterwards had misused the goods, and Gibson ratified the seizure, he thereby became a trespasser *ab initio*, although not privy to the misusing which made him so; and this proposition is stated as law in Com. Dig. "Trespass," C. 1; Elder v. Bemis, 2 Metc. 599, 605. In Coomes v. Houghton, 102 Mass. 211, the alleged servant did not profess to act as servant to the defendant, and the decision was that a subsequent payment for his work by the defendant would not make him one. For these reasons, in the opinion of a majority of the court, the exceptions must be overruled.

Exceptions overruled.

H. RAMSDELL TRANSP. CO. v. LA COM. GEN. TRANSATLANTIQUE.

(182 U. S. 406; 21 Sup. Ct. 831.—1901.)

Mr. Justice GRAY. * * * The answer to the first question certified must therefore be that the statutes of New York do impose compulsory pilotage on foreign vessels inward and outward bound to and from the port of New York by the way of Sandy Hook.

This action is at common law. It is not, and, being for damages inflicted on land, could not be, in admiralty. The Plymouth (1865)

3 Wall. 20, *sub nom.* Hough v. Western Transp. Co. 18 L. ed. 125.

At common law, no action can be maintained against the owner of a vessel for the fault of a compulsory pilot.

In Carruthers v. Sydebotham (1815) 4 Maule & S. 77, 85, Lord Ellenborough, in holding that the act of the pilot was not the act of the master or mariners or owner of the ship, said: "Now to make the pilot the representative of the master, and consequently to exempt the underwriter from liability for his acts, it must first be shown that there is a privity between the pilot and the master, so that the one may be considered as the representative or agent of the other. But does the master appoint the pilot? Certainly not. The regulations of the general pilot act impose a penalty upon the master of every ship which shall be piloted by any other person than a pilot duly licensed, within any limits for which pilots are lawfully appointed. And there is an exception of such places for which pilots are not appointed. But if the master cannot navigate without a pilot except under a penalty, is he not under the compulsion of law to take a pilot? And if so, is it just that he should be answerable for the misconduct of a person whose appointment the provisions of the law have taken out of his hands, placing the ship in the hands and under the conduct of the pilot? The consequence is that there is no privity between them." * * * *

There is no occasion to refer further to the English cases in admiralty, because in England it is held that the ship is not responsible in admiralty, where the owner would not be at common law, differing in this respect from our own decisions. The China, 7 Wall. 53, sub nom. The China v. Walsh, 19 L. ed. 67; Ralli v. Troop (1894) 157 U. S. 386, 402, 423, 39 L. ed. 742, 750, 757, 15 Sup. Ct. Rep. 657; The John G. Stevens (1898) 170 U. S. 113, 120–122, 42 L. ed. 969, 972, 973, 18 Sup. Ct. Rep. 544; The Barnstable (1901) 181 U. S. 464, 21 Sup. Ct. Rep. 684.

In The China, affirming the decision of the circuit court in admiralty, the liability of a vessel *in rem* for a collision from the fault of a compulsory pilot was put upon the maritime law, the court saying: "The maritime law as to the position and powers of the master and the responsibility of the vessel is not derived from the civil law of master and servant, nor from the common law. * * * According to the admiralty law, the collision impresses upon the wrongdoing vessel a maritime lien. This the vessel carries with it into whosesoever hands it may come. It is inchoate at the moment

of the wrong, and must be perfected by subsequent proceedings. * * * "The proposition of the appellants would blot out this important feature of the maritime code, and greatly impair the efficacy of the system. The appellees are seeking the fruit of their lien." 7 Wall. 68, 19 L. ed. 73.

Such was the view of that case taken by the whole court in Ralli v. Troop, in which the majority of the judges said of it: "That decision proceeded, not upon any authority or agency of the pilot, derived from the civil law of master and servant, or from the common law, as the representative of the owners of the ship and cargo; * * * but upon a distinct principle of the maritime law, namely, that the vessel in whosesoever hands she lawfully is, is herself considered as the wrongdoer liable for the tort, and subject to a maritime lien for the damages." 157 U. S. 402, 39 L. ed. 749, 15 Sup. Ct. Rep. 663. And the dissenting judges said that in The China "this court held, contrary to the English, but conformably to the continental, authorities, that a vessel was liable for the consequences of a collision through the negligence of a pilot taken compulsorily on board, although it was admitted that, if the action had been at common law against the owner, and probably also *in personam* in admiralty, there could have been no recovery, as a compulsory pilot is in no sense the agent or servant of the owner." 157 U. S. 423, 39 L. ed. 757, 15 Sup. Ct. Rep. 671.

In none of the cases in which actions at law have been maintained against the owner of a ship for the fault of a pilot was the owner compelled to employ the pilot.

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§ 3A.—INDEPENDENT CONTRACTORS.

LINNEHAN v. ROLLINS.

(137 Mass. 123.—1884.)

Tort, against the owners in trust of an estate on Washington street, in the city of Boston, for personal injuries alleged to have been sustained by the plaintiff through the negligence of the defendants, or of their servants or agents, by the fall of a derrick. Trial in the Superior Court, before PITMAN, J., who allowed a bill of exceptions, in substance as follows:

There was evidence tending to show that the injury to the plain-

tiff was caused by the negligence of the workmen employed by one Elston, who had a written contract with the defendants, by which he agreed "to take down the entire building known as the Adams House in said Boston, belonging to said trustees, or so much thereof as the trustees may request;" and which also provided as follows: "All of said work to be done carefully, and under the direction and subject to the approval of the trustees."

The plaintiff also offered some evidence of negligence on the part of one Wentworth, who was employed by the defendant; which evidence was contradicted by other witnesses.

There was also evidence that one or more of the defendants were present nearly every day, and gave directions as to the work being performed; and evidence contradicting this.

The defendants had employed Elston to perform part of the work in taking down the building named in the contract, and had also employed Wentworth and other persons to do other parts of taking down said building.

The judge instructed the jury upon the effect of said contract as follows: "The plaintiff contends that there was negligence both on the part of Wentworth and the men under his employ in placing this derrick, and on the part of Elston in removing this derrick. So far as regards Wentworth, the relation in which he stands to the defendants is a matter of verbal proof, and the principles which I have given you are to be applied in determining upon the evidence what that relation was. So far as Elston is concerned, the relation in which he stood to the defendants at the outset is a matter of written contract, and where there is a written contract between parties, the construction of that written contract is a matter of law. This contract implies in substance that Elston is to take down the entire building known as the Adams House, or so much thereof as the trustees may request; and, in conclusion, that all of the work is to be done carefully, and under the direction and subject to the approval of the trustees. This contract gives the defendants the right to control and direct the action of Elston. It is not simply a provision that the work must finally meet their approval before they pay him, but it is a provision that, in the first instance, he is to take down just so much of it as they desire, and that he is to do the work of taking down under their direction. There is no other mode of construing it than so as to mean that he, by this contract, was subject to their orders as to the time and manner and mode of doing

the work; than they had the right to step in and say to him, 'You are not doing this as we directed you to do it. We direct you to do thus and so, and we direct you to do this in the other way.' That seems to me, as far as the contract is concerned, to bring the case within the relation of master and servant, so far as Elston and the defendants are concerned. You will observe that, although there has been evidence introduced upon the one side and the other, as to the actual control which the trustees, through one of their number, exercised over the work, and that is all proper and competent evidence for you in considering the matter, yet that the absolute test is not the exercise of power of control, but the right to exercise power of control. If, for instance, there was nothing in the case but this contract, and there was no question that the parties were acting under it, if that is the view you take of it, and that the injury was occasioned by the negligence of Elston, then, although the trustees should be across the Atlantic, nevertheless, under the instructions I give you, if they retained the power to control and direct the work, they would be liable; because it is the possession of the right of interference, the right of control, that puts upon a party the duty of seeing that the person who stands in that relation does his duty properly. If they have retained to themselves the right of directing the mode of doing the work, then, if the work is done wrong, the simple principle is that they are responsible."

The jury returned a verdict for the plaintiff, in the sum of $5500; and the defendants alleged exceptions.

FIELD, J. Whether an owner of a building retains such control over work to be done and the manner of doing it as to render himself responsible for injuries occasioned by the negligence of the contractor and his employees in the performance of the work, depends upon the construction to be given to the contract. (Erie v. Caulkins, 85 Penn. St. 247; Railroad v. Hanning, 15 Wall. 649; Eaton v. European & North American Railway, 59 Maine, 520; Cincinnati v. Stone, 5 Ohio St. 38; Newton v. Ellis, 5 El. & Bl. 115; Blake v. Thirst, 2 H. & C. 20.)

In this case, for the reasons given in the instructions, we think the defendants are liable for injuries occasioned by the negligence of Elston and his employees in doing the work which the defendants requested Elston to do. Railroad v. Hanning, *ubi supra;* Clapp v. Kemp, 122 Mass. 481; Brackett v. Lubke, 4 Allen, 138;

Brooks v. Somerville, 106 Mass. 271; Forsyth v. Hooper, 11 Allen, 419; Kimball v. Cushman, 103 Mass. 194.

Exceptions overruled.[1]

CURTIS v. KILEY.

(153 Mass. 128.—1891.)

FIELD, C. J. As we understand the exceptions, there was evidence for the jury that the yard was under the general control of the defendants; that there was an entrance into, and a passageway across, the yard to the tenement occupied by Mrs. Lahey, which the jury might find the plaintiff was invited by the defendants to use; and that a trench had been dug either across this passageway, or near to it, which rendered the passageway unsafe to those traveling upon it, unless proper guards were put up. The principal contention of the defendants is that as the work of digging the trench, and of laying drain-pipes in it, and of restoring the surface of the yard to its original condition was being done by one Condon, who was a competent person, and not a servant of the defendants, but an independent contractor, and as the defendants retained no con-

[1] In Atlantic Transport Co. v. Coneys, 82 Fed. 177, 51 U. S. App. 570 (1897), the court said: "The fact of a distinction between the liability of an employer for an injury caused by the negligence of his employee or his servant, and the liability of an owner for an injury caused by the negligence of an independent contractor who undertakes to execute specified work upon the owner's property, was formerly not well recognized (Bush v. Steinman, 1 Bos. & P. 404), but is now distinctly understood (Hilliard v. Richardson, 3 Gray, 349). If any confusion now exists, it is in regard to the controlling tests that determine the character of the particular contract which is under examination. The two kinds of employment are frequently close to each other, and, while it is often not difficult to appreciate and understand the difference between the two classes of contracts, it is sometimes difficult to express the distinctions with exactness of language. The cases of Casement v. Brown, 148 U. S. 615, 13 Sup. Ct. 672, and Railroad Co. v. Hanning, 15 Wall. 649, illustrate that, while two contracts may apparently be similar in phraseology, yet their nature and subject-matter may place the respective contracting parties in different relations to each other. The tendency of modern decisions is not to regard as essential or controlling the mere incidentals of the contract, such as the mode and manner of payment (Corbin v. American Mills, 27 Conn. 274) or whether the owner can discharge the subordinate workmen, and not to regard as essential, or an absolute test, so much what the owner actually did when the work was being done, as what he had a right to do."

trol over the manner in which this work should be done, they are not responsible. We think that the case falls within the rule that, when the owner of premises which are under his control employs an independent contractor to do work upon them which from its nature is likely to render the premises dangerous to persons who may come upon them by the invitation of the owner, the owner, by reason of the contract, is not relieved from the obligation of seeing that due care is used to protect such persons. The owner cannot continue to hold out the invitation without being bound to exercise due care in keeping the premises reasonably safe for use according to the invitation. Stewart v. Putnam, 127 Mass. 403; Sturges v. Society, 130 Mass. 415; Woodman v. Railroad Co., 149 Mass. 335.

Exceptions overruled.[1]

BONAPARTE v. WISEMAN.

(89 Md. 12; 42 At. 918.—1899.)

SCHMUCKER, J. This suit was instituted by the appellee, who is life tenant of the house and lot No. 815 King street, in Baltimore city, to recover damages for injury to her house resulting from an excavation made by the appellant on the adjoining lots, Nos. 811 and 813 King street, for the purpose of erecting a warehouse thereon. * * * *

The appellant's fourth prayer asserts the broad proposition that the appellant was not liable for the injury to the appellee's house by the excavation on his lots, because the work was done by Anderson as an independent contractor, under the written agreement appearing in the record. The question of the extent to which the employment of an independent contractor to do work, which is placed entirely under his control, will relieve the employer from

[1] A provision in the contract that the owner's engineer shall supervise and approve daily the work of the contractors does not make them his servants. (Casement v. Brown, 148 U. S. 615.) The liability of a municipal corporation for the negligence of an independent contractor is considered carefully in City of Birmingham v. McCary, 4 So. 630; 38 A. L. J. 208. (Ala. 1888), cf., Herrington v. Lansingburgh, 110 N. Y. 145; 17 N. E. 728; 17 N. Y. S. R. 92; 38 A. L. J. 123, with Pettengill v. Yonkers, 116 N. Y. 558; 22 N. E. 1095; 27 N. Y. S. R. 531.

liability for injuries resulting to third persons, has been much discussed by the courts. The general principle, broadly stated, is that when the work is done by a competent contractor, under an agreement which gives him complete control of the work and of the persons employed by him to do it, such persons will be his servants, and not those of the employer, and the latter will not be liable for injuries caused by the negligence of the workmen, because they are not his servants and are not under his control.

But this doctrine has been repeatedly held not to relieve an employer from all responsibility of every kind for the consequences of defective or unskillful work done on his premises, even by the servants of an independent contractor. In the case of Deford v. State, 30 Md. 179, Chief Judge ALVEY, in an able and elaborate opinion, reviews the leading cases upon this subject, quoting at length from the opinions of the learned judges who decided them, and comes to the conclusion that the distinction is well established between the cases in which, when work is being done under a contract, an injury is caused by negligence in a matter collateral to the contract, and those in which the thing contracted to be done causes the mischief. In the former class of cases the employer is not liable for the injury, but in the latter he is.

In the case of Railroad Co. v. Morey, 47 Ohio St. 207, 24 N. E. 269, the court say: "One who causes work to be done is not liable, ordinarily, for injuries that result from carelessness in its performance by the employee of an independent contractor to whom he has left the work, without reserving for himself any control of an execution of it. But this principle has no application where the resulting injury, instead of being collateral and following from the negligent act of the employee alone, is one that might have been anticipated as a direct or probable consequence of the performance of the work contracted for, if reasonable care is omitted in the course of its performance. In such case, the person causing the work to be done will be liable, though the negligence is that of an employee of an independent contractor." In the same case, at page 214, 47 Ohio St., and page 271, 24 N. E., the court say: "It is equally clear that the law devolves upon every one, about to cause something to be done which will probably be injurious to third persons, the duty of providing that reasonable care shall be taken to obviate its probable consequences. In this class of cases, the doctrine of *respondeat superior* has no application. His liability is based upon the

that he cannot set in motion causes dangerous to the person or property of others without taking all reasonable precautions to anticipate, obviate, and prevent their probable consequences." The same doctrine has been announced by this court in the recent case of Railroad Co. v. Moores, 80 Md. 352, 30 Atl. 644, where the opinion says: "Even if the relation of principal and agent or master and servant do not, strictly speaking, exist, yet the person for whom the work is done may still be liable if the injury is such as might have been anticipated by him as a probable consequence of the work let out to the contractor, or if it be of such character as must result in creating a nuisance, or if he owes a duty to third persons or the public in the execution of it."

Under these authorities, the appellant would have been liable for injury happening to the house of the appellee from the excavation of his lots if it might reasonably have been anticipated that such injury would probably occur as a consequence of an excavation made in the location and to the depth appearing from the evidence in this case. The question as to whether such injury might reasonably have been anticipated as a probable consequence of the excavation was a question of fact for the jury, which would have been taken away from them, if the appellant's fourth prayer had been granted.[1]

[1] In Berg v. Parsons, 156 N. Y. 109, 50 N. E. 957 (1898), the majority of the court held, that, "There are certain exceptional cases where a person employing a contractor is liable, which, briefly stated, are: Where the employer personally interferes with the work, and the acts performed by him occasion the injury; where the thing contracted to be done is unlawful; where the acts performed create a public nuisance; and where an employer is bound by a statute to do a thing efficiently, and an injury results from its inefficiency. Manifestly, this case falls within none of the exceptions to which we have referred. There was no interference by the defendant. The thing contracted to be done was lawful. The work did not constitute a public nuisance, and there was no statute binding the defendant to efficiently perform it. In none of those exceptional cases does the question of negligence arise. There the action is based upon the wrongful act of the party, and may be maintained against the author or the person performing or continuing it. In the case at bar the work contracted for was lawful and necessary for the improvement and use of the defendant's property. Consequently no liability can be based upon the illegality of the transaction, but it must stand upon the negligence of the contractor or his employee alone. It seems very obvious that, under the authorities, the defendant was not responsible for the acts of the contractor or his employees, and that the court should have granted the defendant's motion for a nonsuit."

PEARL v. WEST END ST. RY. CO.

(176 Mass. 177 ; 57 N. E. 339.—1900.)

HOLMES, C. J. This is an action seeking to charge the defendant with the alleged results of a doctor's examination of the plaintiff. The plaintiff had had an accident, and had sued the defendant, whereupon the defendant forthwith sent a doctor to examine him. The plaintiff's trouble was in his left leg, and the doctor, after directing him to stand upon his right leg, told him to stand upon his left leg. The plaintiff said that he could not, and his own doctor also said that he could not bear his weight upon that leg. The examining doctor then told the plaintiff to " try standing on his left leg." The plaintiff tried it, fell, and attributes subsequent hysterical trouble to this cause. At the trial the judge directed a verdict for the defendant, and the case is here on exceptions.

It would be a strong thing to say that the evidence warranted finding any one responsible for the accident except the plaintiff himself. The doctor's request that he should try standing on his left leg was not medical advice or direction upon a matter as to which the plaintiff had put himself in the doctor's hands. On the contrary, it came from one who avowedly was in an adverse interest, and who had no authority of any kind. Furthermore, it recognized in its very words that perhaps the plaintiff was right in thinking that he could not stand in that way. It only called on him for an experiment in a region of admitted doubt. How far the experiment should go necessarily was left to the plaintiff himself when he should make it. If he carried it too far, the doctor was not to blame. See Latter v. Braddell, 50 Law J. C. P. 166, a much stronger case than the present.

But, further, the doctor was not an agent or servant of the defendant in making his examination. He was an independent contractor. There is no more distinct calling than that of the doctor, and none in which the employee is more distinctly free from the control or direction of his employer. See Linton v. Smith, 8 Gray, 147; Milligan v. Wedge, 12 Adol. & E. 737, 741, 742. In this case the doctor was informing himself, according to the suggestions of his own judgment, in order to advise and perhaps to testify for the defendant. We must assume, in the absence of other evidence than

his profession and his purpose, that what he should do and how he should do it was left wholly to him. See Glavin v. Hospital, 12 R. I. 411, 424; Secord v. Railway Co. (C. C.) 18 Fed. 221, 225. An argument is addressed to us drawn from the liability of litigant for his attorney. Shattuck v. Bill, 142 Mass. 56, 7 N. E. 39. But no argument can be trusted that relies on that analogy. Perhaps the liability for an attorney rests on the fact that the very essence of his employment was to represent the person of a party to a suit. "*Attornatus fere in omnibus personam domini representat.*" Bract. 342a. It must be remembered that this right of representation in a lawsuit was conceived with difficulty, and only gradually granted, and, as first allowed, seems to have been worked out through some sort of fictitious identification.

Whether for that reason or another, attorneys sometimes have been spoken of as servants, Anon. 1 Mod. 209, 210, and their acts within the scope of their employment always have been said to be the acts of their clients. Parsons v. Loyd, 3 Wils. 341, 345; Barker v. Braham, 2 W. Bl. 866, 868, 869, 3 Wils. 368, 374; Bates v. Pilling, 6 Barn. & C. 38, 41; Newberry v. Lee, 3 Hill, 523; McAvoy v. Wright, 137 Mass. 207. In short, the liability of client for attorney is the result of a special series of events, and cannot be allowed to found a general rule

We are of the opinion that on one or the other of the foregoing grounds the direction was right.

Judgment on the verdict.[1]

[1] In Myers v. Holborn, 58 N. J. L. 193, 33 At. 389, (1895), the court said; "Dr. P. and the defendant were each of them practicing physicians of this state, having no business connection with one another, except that Dr. P. was attending the patient of the latter while he was temporarily absent. Even if it be admitted, therefore, that Dr. P. was employed by the defendant to attend upon the wife of the plaintiff, that fact did not render the defendant liable for his neglect or want of skill in the performance of this service, *for an examination of the authorities will show that a party employing a person who follows a distinct and independent occupation of his own is not responsible for the negligent or improper acts* of the other. Laugher v. Pointer, 5 Barn. & C. 547; Milligan v. Wedge, 4 Perry & D. 714; De Forrest v. Wright, 2 Mich. 368; Wood, Mast. & Serv. § 311."

§ 3B.—SERVANT WITH TWO MASTERS.

DONOVAN v. LAING.

(1893.—1 Q. B. 625.)

LORD ESHER, M. R. In this case the plaintiff brings an action against the defendants to recover damages for injuries sustained through the negligent act of a man who is said to have been, at the time of committing the negligent act, a servant of the defendants, for whose negligence the defendants are liable. The facts are undisputed. A firm, Messrs. Jones & Co., were engaged in loading a ship from a quay. They had no crane which they could use for that purpose; but the defendants had one, which they were in the habit of lending out with a man in charge of it. On this occasion they lent the crane, with the man in charge, to Jones & Co., for the purpose of assisting in loading the ship. The ordinary mode of using a crane for loading a ship is well known. The goods to be loaded are fastened to the chain and raised, and then the arm of the crane is swung round, so as to bring the goods over the part of the ship where they are to be placed, which is determined by the people who have control of the loading. How far the crane is to be swung, and how much the chain is to be lowered, depends on what part of the ship the goods are to be placed in, and every act in connection with the working of the crane must be done according to the orders of those who are directing the loading. In this case the crane and the man to work it were lent by the defendants to Jones & Co., for a consideration, and to be used in the manner I have described. For some purposes no doubt, the man was the servant of the defendants. Probably, if he had let the crane get out of order by his neglect and in consequence any one was injured thereby, the defendants might be liable; but the accident in the case did not happen from that cause, but from the manner of working the crane. The man was bound to work the crane according to the orders and under the entire and absolute control of Jones & Co. That being so, whose servant was the man in charge of the crane as to the working of it? It is true that the defendants selected the man and paid his wages, and these are circumstances which, if nothing else intervened, would be strong to show that he was a servant of the defendants. So, indeed, he was as to a great many things; but as to the working of the crane he was no longer their servant but bound to work under the orders of Jones & Co., and, if they saw the man misconducting himself in

working the crane or disobeying their orders, they would have a right to discharge him from that employment. This conclusion hardly requires authority; but there is authority for it without going back to an earlier date, in the case of Rourke v. White Moss Colliery Co., (2 C. P. D. 268.) There, one of the questions was, whose servant a man called Lawrence was. He was the general servant of the defendants but he was hired out to another person, and so far as concerned the operation which he performed for that person, and in which he was negligent, he was held not to be the servant of the defendants.

COCKBURN, C. J., in that case said: "It appears to me that the defendants put the engine and this man Lawrence at Whittle's disposal, just as much as if they had lent both to him. But when one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him."

Nothing can be clearer than that. The man was the servant of the defendants; but he was lent to Whittle, and was negligent in the operation in which Whittle employed him, and he was held, so far as that operation was concerned, to be in the employment of Whipple, who had the control of the matter on which he was engaged, over which his general master had no control. The passage referred to from the judgment of Lord WATSON in Johnson v. Lindsay & Co., (1891, A. C. 371,) seems to me to be exactly to the same effect. I only notice the case of Jones v. Mayor of Liverpool, (14 Q. B. D. 890,) because GROVE, J., seems to have thought there was a difference between the cases of a master lending a general servant for a consideration and lending him gratuitously. It seems to me impossible to say that the consideration has anything to do with the principle on which the servant must be held to be in the employ of one or the other.

In the present case, so far as the working of the crane went and so long as he was working it, the man in charge was the servant of Jones & Co., and was not the servant of the defendants.

The appeal must be dismissed.

BOWEN, L. J. The law on the matter now before us seems to me to be perfectly clear. The question is not who procured the doing of the unlawful act; but depends on the doctrine of the liability of a

master for the acts of his servant done in the course of his employment. We have only to consider in whose employment the man was at the time when the acts complained of were done, in this sense, that by the employer is meant the person who has a right at the moment to control the doing of the act. That was the test laid down by CROMPTON, J., nearly forty years ago, in Sadler v. Henlock, (4 E. & B. 570,) in the form of the question, "Did the defendants retain the power of controlling the work?" Here the defendants certainly parted with some control over the man, and the question arises whether they parted with the power of controlling the operation on which the man was engaged. There are two ways in which a contractor may employ his men and his machines. He may contract to do the work, and the end being prescribed, the means of arriving at it may be left to him. Or he may contract in a different manner, and, not doing the work himself, may place his servant and plant under the control of another—that is, he may lend them—and in that case he does not retain control over the work. It is clear here that the defendants placed their man at the disposal of Jones & Co., and did not have any control over the work he was to do. The case is on the same lines as Rourke v. White Moss Colliery Co., *supra,* and Lord WATSON'S decision in Johnson v. Lindsay & Co., *supra,* does not differ from the view taken of the law in the other case. The principal part of the argument for the plaintiff was founded on what may be called the carriage cases: Laugher v. Pointer, (5 B. & C. 547,) and Quarman v. Burnett, (6 M. & W. 499;) but they really have nothing to do with the point presented in this appeal. If a man lets out a carriage, on hire to another, he in no sense places the coachman under the control of the hirer, except that the latter may indicate the destination to which he wishes to be driven. The coachman does not become the servant of the person he is driving; and if the coachman acts wrongly, the hirer can only complain to the owner of the carriage. If the hirer actively interferes with the driving and injury occurs to any one, the hirer may be liable, not as a master, but as the procurer and cause of the wrongful act complained of. In the present case the defendants parted for a time with control over the work of the man in charge of the crane, and their responsibility for his acts ceased for a time. I have only to add, that I agree that no difference can arise whether the lending of the servant to another person is in consideration of some reward or not. Such a distinction obviously cannot affect the reasoning on which I have based my judgment.

STEWART v. CALIFORNIA IMP. CO.

(131 Cal. 125; 62 Pac. 177.—1900.)

VAN DYKE, J. Action for personal injury. The trial was by the court without a jury. Plaintiff had judgment, from which, and an order denying their motion for a new trial, defendants appeal.

The court found that defendant Conger was, on the 4th day of March, 1896, employed by the defendant California Improvement Company as engineer to manage a steam roller owned by said company, and used by it in rolling and leveling streets. The said roller was then in the use of the city of Oakland; the same, with the engineer in charge, having been hired by the city of Oakland from the defendant California Improvement Company. At the time that the accident occurred the roller was being used under the direction of the superintendent of streets of the city of Oakland in rolling and leveling Twelfth street where it forms a dam at the lower end of Lake Merritt; and the court finds that at that time said Twelfth street was the only safe public highway for the passage of vehicles between the eastern and central parts of Oakland, and that the plaintiff was then driving a well-trained, steady, and reliable horse on said street. "While the defendant Conger was in charge of said engine, and standing thereon, and in control thereof, steam escaped from the engine through the safety valve in front of plaintiff's horse. It had been necessary to generate all the steam which the engine could safely carry, and the defendant Conger had wrongfully and carelessly failed and neglected to give any warning of the said letting off of steam, or that there was any danger of its escape through the safety valve although he (the said defendant) saw the danger to the plaintiff, and had the opportunity and power to give him warning thereof; and the escaping of the steam so frightened the plaintiff's horse that it became unmanageable, and wheeled short around, and tilted over plaintiff's cart, and the plaintiff, without any fault on his part, was thrown out, and dashed violently upon the ground." The main contention on the part of the defendant company was and is that the injury to the plaintiff was not caused by its negligence, but, if it resulted from any negligence, it was upon the part of the city of Oakland. But the court below found that said defendant California Improvement Company had selected the said engineer, and his services were to be paid by said company, and said company had

the right to remove him; that the relation of master and servant existed between said defendant company and the defendant Conger, and not between the city of Oakland and defendant Conger. The testimony supports the finding and conclusion of the court below that the injury to the plaintiff was caused by the negligence of the defendants, and not of the city of Oakland.

* * * * *

In Huff v. Ford, 126 Mass. 24, a wagon and horses and driver were hired by the city from the defendants, and the driver, while thus employed, struck one of the horses a violent blow, causing it to kick a loose shoe through a window. The decision reads: "The driver, employed and paid by the defendants, and who had entire management of the horses as to the manner of driving them, and whose duty it was to see that they were properly shod, was a servant of the defendants in so driving the horses; and for injuries to third persons by his negligence in these respects the defendants were responsible." The cases cited by appellant do not hold that in a case of this kind, where a person has not the control of the conduct of the other in the particular matter in question, he is liable for the negligence of such other. The test in all these cases is, who conducts and supervises the particular work, the doing of which; or the careless and negligent doing of which, causes the injury or damage? Here the city simply hired the use of the street roller outfit from the defendant company—to wit, the roller, engine, and the engineer to manage the same—for so much a day. The city's agent—foreman of the street superintendent—only directed or supervised how and where the street should be rolled. He did not have the control or management of the engine. This was subject entirely to the judgment of the engineer, the servant of the owner, the defendant company, who had selected and employed him for that special purpose, paid him his wages, and had the sole right to discharge him. We think the conclusion of law deduced by the court below from the facts found that the defendants are liable, and not the city of Oakland, is correct.

The judgment and order appealed from are affirmed.[1]

[1] In Higgins v. Western Union Tel. Co. 156 N. Y. 75; 50 N. E. 500 (1898), the court said: "The fact that the party to whose wrongful or negligent act an injury may be traced was at the time in the general employment and pay of another person does not necessarily make the latter the master, and responsible for his acts. The master is the person in whose business he is

§ 3c.—SCOPE OF AUTHORITY.

MAIER v. RANDOLPH.

(33 Ks. 340.—1885.)

VALENTINE, J. This action was commenced by W. A. Randolph and A. G. Randolph, partners as Randolph & Randolph, against Frank Maier, before a justice of the peace, and, after judgment, the case was appealed to the district court, in which court it was again tried, before the court and jury, and judgment was rendered in favor of the plaintiffs and against the defendant, for the sum of $144, and for costs. The defendant, as plaintiff in error, now brings the case to this court.

The case was tried in the district court upon the bill of particulars filed in the justice's court, which alleges, in substance, as follows: The plaintiffs owned a two-year-old thoroughbred Shorthorn bull, and the "defendant, by his employee and agent, without the knowledge and consent of the said plaintiffs, killed said bull; that said plaintiffs were damaged by the killing of said bull in the sum of $250." We think the bill of particulars presents a cause of action. * * * We think the evidence showed liability on the part of the defendant. A principal, or master, or employer, is usually liable to third parties for the acts or negligence of his agent or servant while acting within the scope of his employment. Here the defendant instructed his servant to go to a certain place at a certain time and kill a beef. The servant went to such place, at such time, and, finding no animal there except the plaintiff's bull, killed the bull, skinned him, dressed him, and hung his carcass up in the slaughter-house as a beef. Evidently the servant was honestly attempting to obey the master's order, and evidently the servant thought that he was doing so; but he was honestly mistaken. A "beef," according to Webster's Dictionary, may be either a bull, a cow, or an ox. The servant was all the time acting for the master, and he killed this bull while in the execution of his master's business, and within the scope of his employment; and therefore his master is liable.

Judgment reversed on other grounds.

engaged at the time, and who has the right to control and direct his conduct. Servants who are employed and paid by one person may nevertheless be, *ad hoc*, the servants of another in a particular transaction; and that, too, when their general employer is interested in the work. Wyllie v. Palmer, 137 N. Y. 248, 33 N. E. 381."

WESTERN RY. OF ALABAMA v. MILLIGAN.

(135 Al. 205; 33 So. 438.—1902.)

McCLELLAN, C. J. The theory upon which this case was tried, and upon which there were verdict and judgment for the plaintiff, Milligan, was that the railway company is responsible for the act of Cunningham, its alleged superintendent, in playfully punching or pushing Milligan in the side with a small stick when he told the latter to brush off the table of the machine, which was constituted in part of knives set in its center, and at the time rapidly revolving; that Milligan was "goosey," as he expresses it, or ticklish; and that the light punch or push in his diaphragm so upset him as to cause him to throw his hand among the knives, by which it was cut off. We are not of opinion that this act of Cunningham, assuming that he had superintendence intrusted to him in respect of having Milligan to brush off the table and that the act was done while he was in the exercise of such superintendence, was an act of superintendence for the consequences of which, under the employer's liability act, the company is liable. There is no pretense that the act was intended or calculated to further the work Cunningham had directed Milligan to do. It bore no sort of relation to that work, but was a mere casual pleasantry, or act of fun-making, on the part of Cunningham toward Milligan, as one man would tickle another to make him jump or laugh spasmodically. It is testified that Cunningham knew that Milligan was "goosey," or ticklish,—given to ridiculous gyrations when he was pushed or punched or touched,—and the men there in the shops were in the habit more or less of touching or pushing him to see him jump. It was for this, and not in connection with the work he was directed to do, that Cunningham touched him on the occasion in question (if, indeed, he touched or punched or pushed him at all, which is positively denied by Cunningham and several other apparently credible witnesses). That if Cunningham was guilty of any negligence in the premises it lay in this extraneous act, the evidence shows beyond controversy. That this was not an act of superintendence, we are entirely clear. That a negligent act, although committed by one intrusted with superintendence by the common employer and while in the exercise of such superintendence, is not an act for which the employer is responsible, when it is not an

act of superintendence under the statute, is clear upon reason and is settled by the authorities. Reno Employer's Liability Acts, § 59; Rob. & W. Employ. Liab. pp. 265–267; Dresser's Employer's Liability, § 62.

This whole case turns upon the question we have been considering: Whether Cunningham's alleged act of pushing or punching or touching Milligan while the latter was about to brush off the table upon which the knives were fixed was an act of superintendence. Reaching the conclusion that this was not an act of superintendence, and that of consequence the defendant was not responsible for it, our further inevitable conclusion is that the city court erred in refusing to give the affirmative charge requested by the defendant.

Reversed and remanded.

ROBINSON v. McNEIL.

(18 Wash. 163; 51 Pac. 355.—1897.)

SCOTT, C. J. This action was brought to recover damages sustained by John Walter Robinson, caused by falling from a hand car under the general control of the defendant, and the plaintiff has appealed from a judgment of nonsuit.

From the plaintiff's showing it appears that he, with a number of other boys, had obtained the loan of the hand car from the section foreman, who had control of it for the purpose of enabling him to discharge his duties in repairing the track, etc. The boys had obtained the car for the purpose of going along the track to a swimming place, a mile or more distant, and on the way there the plaintiff fell off, and was injured. It will be observed that the action was not founded upon any negligent or wrongful act of the defendant's servant in allowing the car to remain exposed and unsecure, so that boys of immature years might be tempted to use it; and also that the car was not being used, at that particular time, in the company's business. It was not shown nor claimed that the section foreman had any authority to loan the car at all, and in fact it may be fairly assumed from the record that it was a violation of his duties to loan it. His act in so doing was entirely outside of and exceeded the scope of his employment. This being so, under the great weight

of the authorities the defendant was not liable for his wrongful act, and the nonsuit was properly granted.

Affirmed.[1]

FISK v. ENDERS.

(73 Conn. 338 : 47 At. 681. 1900.)

TORRANCE, J. The complaint in this case alleged, in substance, that on the 10th day of June, 1899, through the negligence of one McNally, the defendant's servant, "acting in the line of his services," a pair of horses belonging to the defendant, then in the care and custody of McNally, ran against the plaintiff and injured her. The defendant suffered a default, and the case was heard in damages. Upon that hearing the main question in dispute was whether at the time of the injury aforesaid, McNally was so using said horses in the business or service of the defendant as to make her responsible for the results of his negligence. Upon certain subordinate facts, set forth in the record, the trial court held that he was not then so engaged in the service or business of the defendant as to make her responsible for his negligence; and the plaintiff says the court erred in so holding.

The substance of the subordinate facts found, bearing upon this part of the case, may be stated thus: On the day of the injury, and for some years before, McNally was and had been in the employment of the defendant as her coachman. He had the sole care of her horses, was her driver when she used them, and exercised them when they required exercise. In the matter of exercising them, the defendant, when in town, gave specific directions in each instance. In her absence McNally had general instructions to exercise them only when necessary, and then to drive them only in the country. He had no authority to use the horses for his own use or pleasure, or except as above stated, although at times he had used

[1] *Cf.* Erie Ry. Co. v. Salisbury, 66 N. J. L. 233, 50 At. 187, 55 L. R. A. 578 (1901); holding that: "When the company placed the push car in the hands of the foreman, it was the duty of the foreman to use it with reasonable care to prevent injury to anyone lawfully on the tracks, and to keep it under his own supervision until it was returned. * * * * The obligation to see that this duty is performed is cast upon the railroad."

them otherwise without the defendant's knowledge. On the morning of the day of the injury, McNally drove the defendant to the railroad station, where she took a train for New York. About 11 o'clock in the forenoon of the same day, in the absence of the defendant and without her knowledge or consent, McNally took the horses from the defendant's stable, harnessed them to her carriage, and started towards the city of Hartford for a drive. His purpose in so doing was not to exercise the horses, for they needed none then, nor to use them upon any business or service of the defendant, but solely for his own pleasure and amusement. From the time he left the defendant's stable as aforesaid until the accident, he did no errand, service, or act for, or in any way connected with, her business or affairs, and had no intention of doing any. His sole purpose in taking the ride was personal to himself, and wholly for his own amusement and gratification. "Said drive by McNally was wholly unknown to the defendant, and unauthorized by her, either expressly or impliedly, or by any general instruction, direction, or orders; and while engaged in it McNally was not at any time acting within the scope of his employment as the defendant's coachman and servant, or in the line of his service as such coachman and servant." It was while McNally was thus using the horses "wholly for his own amusement and gratification" that the injury to the plaintiff occurred. Upon these subordinate facts, according to the principles laid down in the cases cited below, it is too clear for argument that McNally at the time of the accident was not the servant or agent of the defendant in any such sense as made her responsible for his negligence, and the trial court did not err in so holding. Phelon v. Stiles, 43 Conn. 426; Stone v. Hills, 45 Conn. 44; Ritchie v. Waller, 63 Conn. 162, 28 Atl. 29, 27 L. R. A. 161.

Upon the hearing in damages the defendant offered evidence to show that, in taking and using the horses as he did at the time of the injury, McNally was acting not for the defendant, nor on her behalf, but "wholly for his own amusement and gratification." The plaintiff had in effect alleged in the second ground that it was inadmissible under the defendant's notice. The court admitted the evidence, and this is assigned for error. We think the court did not err in so ruling. The plaintiff had in effect alleged in the second paragraph of her complaint (1) that on the day of the accident McNally was the servant of the defendant; (2) that, at the time the horses ran as aforesaid, McNally was acting for the defendant in her

business and service, and within the scope of his employment. The defendant, in her notice, stated, in effect, that she admitted the first of these allegations, but would, if it became necessary, deny and disprove the second. Under such a notice the objection made was clearly untenable.

In the other assignments of error it is alleged that the trial judge found certain facts without evidence, and refused to find certain other material facts which he ought to have found. Of these assignments it is enough to say that they are not supported by the record.

There is no error. The other judges concurred.

LIMA RY. CO. v. LITTLE.

(68 Ohio St. 91 ; 65 N. E. 801.—1902.)

This was an action commenced originally in the court of common pleas of Allen county, Ohio, by Margaret Little against the Lima Railway Company, to recover damages for injuries sustained by her in attempting to board one of the company's street cars at the public square in the city of Lima. Mrs. Little had come to the public square as a passenger on one of the company's cars from the south part of the city of Lima, and had received from the conductor of the car on which she came from the south a transfer ticket which entitled her to passage on an east-bound Market street car. Said east-bound Market street car was standing at the company's transfer station near the center of said public square at the time Mrs. Little reached said station from the south. While she was attempting to get upon said east-bound Market street car, and had placed one foot on the lower step, the bell of said car was rung by one John Cordrey, the car was suddenly started, and she was thrown to the street and injured. The Market street car which Mrs. Little was then attempting to board was car No. 36, and had come to the transfer station only a minute or two before, in charge of said John Cordrey as conductor thereon, and one O'Malley as motorman.

CREW, J. * * * In the cases just cited, the principle upon which the master was held to be liable, to wit, that the servant injured was not at the time of the injury in the service of the master,

would, when applied to this case, and for like reason, exempt the master from liability, if the facts assumed in the request to charge were, by the evidence, shown to exist. The test of a master's liability is not whether a given act was done during the existence of the servant's employment, but whether such act was done by the servant while engaged in the service of, and while acting for, the master, in the prosecution of the master's business, and such is the rule whether the act complained of be wanton and willful, or whether it be merely negligent on the part of the servant or employee. In whatever else they may differ, the authorities agree upon the principle that an employer is not liable for the acts of an employee unless committed while engaged in the service or duties of his employment.

The question presented by the instruction that was asked by plaintiff in error is not whether what was done by Cordrey was such an act as would have been within the course and scope of his employment and duties if he had then been on duty as conductor with the right to control and direct the movements of said car, but is, quoting from the request, "if his trip and duties had ended, and McGuff, as conductor, and Smalley, as motorman, had absolute charge of said car No. 36, and so continued in charge up and until the accident occurred," whether under such circumstances the railway company would be liable for the unauthorized act of Cordrey in causing said car to be started in the manner he did. While the rule is well established that the master will not be exempt from liability merely because the act of a servant was in disregard of a rule laid down by the master, or was in disobedience of his express command, yet, on the other hand it is equally well settled that, to make the master responsible for the act of a servant or employee such act must be done by such servant or employee while engaged in the service and duties of his employment, and in the prosecution of his master's business. The fact that Cordrey worked daily for said company, and was, in a popular sense, its employee, could not operate to make the railway company liable at all times and under all circumstances for his negligent conduct. Whether the company is so liable in a given case is made to depend upon actual service within the scope of his employment. A master has the right to select and choose his agents, and to determine himself, and assign to the servants so selected, their respective duties, and no assumption by an employee of duties not assigned to him will bring those duties within the course or scope of his employment as defined by the master, and

when an act is not within the scope of a servant's employment it cannot be within either the express or implied authorization of the master.

If, as assumed by the instruction requested by plaintiff in error, at the time the accident complained of occurred, McGuff was then the conductor in absolute charge and control of said car, and Cordrey's trip and duties as conductor thereon had ended, then and in that event Cordrey, having no longer any duty to perform in or about that car, and it being no longer any part of his duty under his employment to be or remain on said car, his act (the ringing of the bell as a signal to start) was an unauthorized assumption of authority, not within the line of his duty or the scope of his employment, and the railway company would not be responsible therefor. The instruction asked by plaintiff in error was, we think, a proper instruction, and should have been given.

COHEN v. D. D. ETC. RY. CO.

(69 N. Y. 170.—1877.)

Appeal from order of the General Term of the Superior Court of the City of New York, reversing a judgment in favor of defendant, entered upon an order nonsuiting plaintiff on trial, and granting a new trial. Reported below, 8 J. & S. 368.

This action was brought to recover damages alleged to have been sustained by reason of the negligence of plaintiff's servant. On April 27, 1872, plaintiff was driving along Catharine street, in the city of New York, in a buggy. He had crossed the track of defendant's road, but before the rear part of the buggy was far enough from the track so that a car could pass without striking it, his further progress was arrested by a blockade of trucks and other vehicles, and he was unable to move forward, and by other vehicles he was prevented from moving in any direction. A car approached on defendant's road, the driver of which, as plaintiff testified, after waiting a moment or two, told the plaintiff to "get off the track." The plaintiff asked him to wait until the trucks moved, promising then to move. The driver said, "Damn you, if you don't get off

here; I am late; I will get you off some way or other." The plaintiff said, "You wait a moment; I guess the trucks are moving and I may go." The trucks started and as the plaintiff prepared to move on, the driver started his horses and the platform of the car struck the hind wheels of the buggy and overturned it, thus causing the injury complained of.

Defendant's counsel moved for a nonsuit on the ground, among others' that the car-driver's act was not within the scope of his authority, but was an unlawful and unauthorized act, for which defendant was not responsible.

PER CURIAM. The general rule of law contended for by the appellant, that a master cannot be held liable for the willful, intentional and malicious act of his servant, whereby injury is caused to a third person, is not disputed. Many limitations and illustrations of the rule will be found in reported cases, and it is not always easy to apply the rule. It has recently been under consideration in this court in the case of Rounds v. The Delaware Lack. & Western R. R. Co., 64 N. Y. 129, and in the opinion of Andrews, J., in that case, is found a very thorough and satisfactory consideration of the rule and the principles upon which it is founded. The general principles there announced are as follows: To make a master liable for the wrongful act of a servant to the injury of a third person, it is not necessary to show that he expressly authorized the particular act. It is sufficient to show that the servant was engaged at the time in doing his master's business, and was acting within the general scope of his authority, and this, although he departed from private instructions of the master, abused his authority, was reckless in the performance of his duty, and inflicted unnecessary injury. While the master is not responsible for the willful wrong of the servant, not done with a view to the master's service, or for the purpose of executing his orders; if the servant is authorized to use force against another, when necessary, in executing his master's orders, and if, while executing such orders, through misconduct or violence of temper, the servant uses more force than is necessary, the master is liable.

The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances of the occasion,

goes beyond the strict line of his duty or authority, and inflicts an unjustifiable injury upon another.

The master is not exempt from responsibility in all cases on showing that the servant, without express authority, designed to do the act or the injury complained of. But if the servant, under the guise and cover of executing his master's orders, and executing the authority conferred upon him, willfully and designedly, for the purpose of accomplishing his own independent, malicious or wicked purposes, does an injury, then the master is not liable.

When it is said that the master is not responsible for the willful wrong of the servant, the language is to be understood as referring to an act of positive and designed injury not done with a view to the master's service, or for the purpose of executing his orders.

The application of these principles to the facts of this case leaves no doubt that the case was properly disposed of by the General Term of the Supreme Court. The driver was driving this car for the defendant, and in its business. As the car could only run upon the railroad track, it was his duty, so far as he reasonably and peaceably could, to overcome obstacles on the track in the way of his car; and in driving his car and overcoming these obstacles, he was acting within the general scope of his authority. If he acted recklessly (and that is the most that can be said here), the defendant was responsible for his acts. He was not seeking to accomplish his own ends. He was seeking to make his trip on time, and for that purpose, and not for any purpose of his own, sought to remove plaintiff's buggy from the track. It cannot be said to be clear, upon the facts proved, that the act of the driver was done with a view to injure the plaintiff, and not with a view to his master's service. He may have supposed that the plaintiff would get off from the track in time, or that he could crowd him off without injury. The evidence should at least have been submitted to the jury. They were the proper judges of the motives and purposes of the driver, and of the character and quality of his acts.

The order must be affirmed and judgment absolute ordered against the defendant with costs.

PALMERI v. MANHATTAN RY. CO.

(133 N. Y. 261.—1892.)

GRAY, J. Quite recently we had occasion to consider a case where the ticket agent of a railroad company directed the arrest, by police officers, of a person in the railroad station, whom he suspected of being a counterfeiter, and the company was thereafter sued for false imprisonment. In that case the facts were, briefly stated, that the ticket agent had been notified by the police authorities to watch for men of a certain description, suspected of passing counterfeit bills. Upon a certain occasion two men came into the station, and one of them tendered a bill in payment for tickets. The agent suspected them of being the counterfeiters wanted by the police, and thought the bill looked "queer," but nevertheless took it, and gave back the change with the tickets, saying nothing to them. He then sent for a police officer, to whom he pointed out the men, who were then on the station platform. The bill was subsequently pronounced to be genuine, and the man was discharged. We held that the company was not responsible in damages, because the agent was not, in what he did, acting within the scope and line of his duty. His acts were not such as could be deemed to be performed in the course of his employment, or such as were demanded for the protection of his employer's interest, but rather those of a citizen desirous of aiding the police in the detection and arrest of persons suspected of being engaged in the commission of a crime. His duty, as the particular agent of the company, was to have refused to accept and change the bill tendered in payment for passage tickets, if he supposed it was not genuine; and, when he did accept it, his only purpose could have been to further the efforts of the police authorities by such a step, and could not possibly be considered as something which his employers or his employment required of him. I refer to the case of Mulligan v. Railway Co., 129 N. Y. 506.

In the present case, however, the acts of the ticket agent were of a different character. The plaintiff purchased a ticket of the agent at the elevated railroad station, and passed through to take the cars, after some altercation about the amount of the change. The ticket agent immediately afterwards came out upon the platform of the station, charged her with having given him a counterfeit piece of

money, and demanded another quarter in place of the one given him. She insisted upon her money being genuine, and refused to give another quarter or to hand back the change. He became angry, and called her a counterfeiter and a common prostitute. He placed his hand upon her, and told her not to stir until he had procured a policeman to arrest and to search her. He detained her in the station for a while, but let her go when he failed to get an officer. This action was then brought to recover damages because of injury sustained from the unlawful imprisonment, or the restraint imposed upon the plaintiff's person, accompanied by the slanderous words, publicly spoken, concerning her. The jury believed her story, and the judgment which she has recovered the appellant seeks to avoid principally upon the ground that the ticket agent was acting outside of the scope of his employment in doing the acts complained of. The appeal must fail.

This is not like the Mulligan Case. Here the agent was acting for his employers, and with no other conceivable motive; losing his temper and injuring and insulting the plaintiff upon the occasion. He believed that plaintiff had passed a counterfeit piece of money upon him, and thus had obtained a passage ticket and good money in change. What he did was in the endeavor to protect and to recover his employer's property; and if, in his conduct, he committed an error, which was accompanied by insulting language and the detention of the person, the defendant, as his employer, is legally responsible in an action for damages for the injury. For all the acts of a servant or agent which are done in the prosecution of the business intrusted to him the carrier becomes civilly liable, if its passengers or strangers receive injury therefrom. The good faith and motives of the servant are not a defense, if the act was unlawful. Once the relation of carrier and passenger entered upon, the carrier is answerable for all consequences to the passenger of the willful misconduct or negligence of the persons employed by it in the execution of the contract which it has undertaken towards the passenger. This is a reasonable and necessary rule, which has been upheld by this court in many cases, of which Weed v. Railroad Co., 17 N. Y. 362; Hamilton v. Railroad Co., 53 N. Y. 25; Stewart v. Railroad Co., 90 N. Y. 588; and Dwinelle v. Railroad Co., 120 N. Y. 117, are sufficient instances.

What materially distinguishes the present from the Mulligan Case is that there the servant of the company was not acting for

the protection of the company's interest, but went quite outside of the line of his duty to perform a supposed service to the community, by procuring the arrest of criminals whom he knew the authorities were endeavoring to apprehend. That did not enter into the transaction of his employer's business, whereas here the ticket agent clearly was engaged about the company's affairs, but, in the belief of the jury, unlawfully detained the plaintiff, and insulted her by slandering her character. It is needless to consider the case of Mali v. Lord, 39 N. Y. 381, so much relied upon by the appellant. There is no parallel between the case of a clerk in a store, who has a person arrested and searched upon suspicion of a theft, and whose general employment could not warrant such an act, and the present case, of an agent who is considered to be invested by the carrier with a discretion and a duty in matters of his employment, from which an authority is inferable to do whatever is necessary about it. Though injury and insults are acts in departure from the authority conferred or implied, nevertheless, as they occur in the course of the employment, the master becomes responsible for the wrong committed. Judge ANDREWS, in Rounds v. Railroad Co., 64 N. Y. 129, points out the distinguishing principle of these cases, and refers to Mali v. Lord in the course of his opinion. * * * *

The judgment should be affirmed, with costs.

BERGMAN v. HENDRICKSON et al.

(106 Wis. 434; 82 N. W. 304.—1900.)

THE plaintiff, intoxicated, entered defendants' saloon. After making two purchases of liquor for himself and others, for which he refused to pay, he finally made a third purchase from the barkeeper, one Backstrom. For this also he refused to pay when called on, and some altercation took place, whereupon the barkeeper struck him and rushed out from behind the bar, and seized him, whereupon he fell to the ground, injuring his thumb seriously. He recovered a verdict, upon which judgment was rendered in plaintiff's favor, from which this appeal is taken. Other material facts are stated in the opinion.

DODGE, J. 1. The principal assignment of error upon which

appellants dwell is that the evidence conclusively establishes that the assault by Backstrom upon the plaintiff was entirely personal to the former for the purpose of wreaking personal vengeance, or satisfying his personal anger and indignation, aroused by a threatening motion and an opprobrious epithet applied to him by the plaintiff, Backstrom testified upon the trial that the plaintiff, in the course of the colloquy, threw his hands up across the bar, in a manner indicated by gestures, and called him by a vile epithet, and that he thereupon lost all thought or consideration of his master's business, or of collection for the liquor sold, and committed the assault upon the plaintiff because of such motion and epithet. On a previous trial the same witness had testified, substantially, that the assault was made because the plaintiff did not pay for the drinks, and to compel him to do so; and gave a narrative of the events which wholly omitted both the threatening motion and the verbal abuse, asserting that his narrative was complete. The defendant who was present gave an account of the transaction, which indicated at least that the assault was the immediate sequence of the refusal to pay, without mentioning the circumstances which Backstrom related as arousing his personal ire. The plaintiff's own story, also, while quite indefinite, tended to the same effect.

We are persuaded that the conclusion of the trial court that the testimony was open to two inferences—one that the assault was entirely personal, the other that it was done with the purpose and in the line of enforcing payment—ought not to be disturbed. The appearance of the witness Backstrom, the manner of his giving the new testimony on which the appellants now dwell and of responding to the cross-examination with reference to his previous testimony, might well have justified the jury in disbelieving the new facts testified to on the last trial, and we cannot feel justified in saying that the trial court erred in submitting to them the question of Backstrom's motive and purpose, nor in refusing to set aside their conclusion. If Backstrom committed the assault for the purpose of collecting payment for his master's liquor, he was within the scope of his employment. It was his method of performing the duty delegated to him, and, although the method may not have been either expressly authorized or even contemplated,—nay, although it may have been expressly prohibited,—yet the master is liable for the damages caused thereby, provided he has intrusted to the servant the duty he was attempting to perform. Craker v. Railway Co., 36 Wis.

657; Schaefer v. Osterbrink, 67 Wis. 495, 30 N. W. 922; Rogahn v. Foundry Co., 79 Wis. 573, 48 N. W. 669; Reinke v. Bentley, 90 Wis. 457, 63 N. W. 1055; Bryan v. Adler, 97 Wis. 124, 72 N. W. 368, 4 L. R. A. 658.

2. The appellants contend further that, although the bartender may have been acting within the scope of his duties, the master is not liable if the plaintiff, by words or acts, conducted himself in such improper manner as was calculated to arouse and bring on personal altercation with the bartender, and the assault complained of was wholly or in part the result of such misbehavior on the part of the plaintiff. The court refused a requested instruction to that effect, and, on the contrary, charged: "If Backstrom was impelled to the assault, whatever words may have passed, by a purpose to enforce payment of the liquor bill that he was trying to collect, and committed the assault as incidental to such effort, plaintiff should recover." The rule thus laid down by the court is that sanctioned by the authorities above cited; and the exception thereto, contended for by appellants, in case of misconduct or verbal provocation on the part of plaintiff, is nowhere recognized. Such an exception would ignore the principle on which the liability is founded, namely, that the tortious act of the servant, when within the scope of his duty, is the act of the master himself. That being the principle, the tort, when so committed by the servant, can be justified on no grounds less cogent than those which would serve as justification of the same act if committed by the master. In Rogahn v. Foundry Co., 79 Wis. 575, 48 N. W. 669, it is said: "It is generally agreed that for negligent or wrongful acts of the servant in the line of his duty, for which the master would be liable if the act were done by himself, the master is responsible." It need hardly be stated that neither insult nor vituperation can fully justify assault and battery, though they may properly mitigate damages in civil actions or punishment in criminal prosecutions.

Appellants press upon our attention, supporting the exemption of the master in case of misconduct or insult by plaintiff to the servant, the case of Scott v. Railroad Co., 53 Hun, 414, 6 N. Y. Supp. 382, which, upon examination, proves to have no relevancy whatever. That case deals with a very different ground of liability, namely, that which is imposed on the master for willful torts of a servant, although outside of the line of his duty, when the relations between the master and the plaintiff are such that the former is under an obliga-

tion to protect the latter against such wrongs, whether committed by servants or others. That liability is well stated and illustrated in Craker v. Railway Co., 36 Wis. 657, and Fick v. Railway Co., 68 Wis. 469, 32 N. W. 527, and is grounded not so much on the principle of *respondeat superior* as upon the failure of a carrier to perform its duty to protect its passengers and patrons. Such was the case urged on us by the appellants. There, the driver of a street car assaulted a passenger to avenge insults and threats offered to him personally. His act was wholly personal, and outside the scope of his employment. The plaintiff's right of recovery depended, not on the fact that the assault was committed by a servant, but on the fact that he suffered an assault while entitled to protection as a passenger. The rule of law declared in that case was responsive to the situation, and went no further than to hold that a passenger is entitled to protection only so long as his own conduct merits it, and that the carrier is not bound to protect him against the usual and probable results of his own misbehavior. If the soundness of that doctrine were fully conceded, it would not affect defendant's liability in the present case, predicated not on failure to protect, but upon defendant's own affirmative wrong, committed through their servant, acting in the line of his duty.

We discover no error. Judgment affirmed.[1]

[1] In McDermott v. Am. Brewing Co., 105 La. 124, 28 So. 498 (1901), the court said: "It is not contended that the defendant was sent for this beer. As we interpret the testimony, it made no difference to them whether or not he brought it back, as he was bound for it in case he did not return it, or he was bound to pay the price for which he was instructed to sell it. By the effect of the agreement between defendant and his servant, it had become the latter's business. The unlawful assault was not in any manner necessary for the performance of the driver's work. A servant has implied authority to do what is necessary to protect his master's property or to fulfill the duties intrusted to him, but neither was sought to be done by this driver. In another jurisdiction it has been decided that, where a person employed to collect payments for machines sold on the installment plan is instructed in case of refusal to pay, not to touch the machines, or take them back, the employer is not liable for an assault committed by the servant or agent in connection with an attempt, not authorized, to seize the machine. Feneran v. Manufacturing Co., 47 N. Y. Supp. 284, 20 App. Div. 574. Here there is analogy to the decision last cited in this: the kegs of beer had been delivered in accordance with the requirements of the defendant's business, but the cash had not been collected by the driver on delivery. The subsequent act was unauthorized, and the master was no longer concerned, as the driver was bound for payment under the terms of his agreement."

In Lynch v. Florida Cent. & P. Ry. 113 Ga. 1105, 39 S. E. 411, (1901), the

SAVANNAH, F. & W. RY. CO. v. QUO.

(103 Ga. 125; 29 S. E. 607.—1897.)

COBB, J. Lula Quo sued the Savannah, Florida & Western Railway Co., alleging that on June 13, 1896, while she was a passenger upon the train of the defendant, one Monroe, an employee of the defendant, unlawfully assaulted her and attempted to commit a rape upon her person, and that the defendant was negligent in not protecting her, and in having such employee in its service; it being known to the company that he was notoriously a dissolute and abandoned character. Upon the trial the evidence was conflicting, but there was evidence in behalf of the plaintiff, which, if credible, established the allegations in her petition. It appeared from this evidence that the person committing the assault was a baggage master on the train, and that he came into the part of the coach in which the plaintiff was sitting alone, and, having fastened both of the doors of the car, committed the assault upon her which is the subject-matter of her complaint, and did not desist until some one came to one of the doors, and witnessed what was transpiring in the car. The jury returned a verdict in favor of the plaintiff for $2,000, and, the defendant's motion for a new trial being overruled, it excepted.

When a contract of carriage is entered into between a passenger and a carrier, there arises out of the relation thus created not only a duty to safely transport the passenger to the destination fixed in the contract, but also to protect him from injury, violence, insult, and ill treatment at the hands of the servants of the carrier who are in charge of, or connected in any way with, the carriage in which the passenger is being transported. 5 Am. & Eng. Enc. Law (2d ed.) p. 541. This seems to be the settled doctrine of this state. Railroad Co. v. Turner, 72 Ga. 292; Railroad Co. v. Condor, 75 Ga. 51; Railway Co. v. Fleetwood, 90 Ga. 23, 15 S. E. 778.

court used this language: "So that it is evident that plaintiff did not go to the warehouse, at the time, because of any business he had with the plaintiff as agent of the company, but for the purpose of adjusting a personal grievance, and, if it was not adjusted in a manner entirely agreeable to him, he should not attribute the fault to the railroad company. It was purely a personal matter between the three, and, if the plaintiff has any cause to complain, it is against the individuals who inflicted the injuries upon him, and not against the railroad company, who at that time owed him no duty of protection. There was no error in the judgment awarding a nonsuit."

While a carrier of passengers owes a duty to all of its passengers, to protect them from violence and insult on the part of its servants, it owes an especial duty to female passengers, to protect them from insult and abuse. In the case of Chamberlain v. Chandler, 3 Mason, 242, Fed. Cas. No. 2,575, Judge STORY, in discussing the question now under consideration, uses the following language: "In respect to passengers, the case of the master is one of peculiar responsibility and delicacy. Their contract with him is not for mere ship room and personal existence on board, but for reasonable food, comforts, necessaries, and kindness. It is a stipulation, not for toleration, merely, but for respectful treatment; for that decency of demeanor which constitutes the charm of social life; for that attention which mitigates evils without reluctance, and that promptitude which administers aid to distress. In respect to females, it proceeds yet further. It includes an implied stipulation against obscenity, that immodesty of approach which borders on lasciviousness, and against that wanton disregard of the feelings which aggravates every evil, and endeavors, by the excitement of terror, and cool malignity of conduct, to inflict torture upon susceptible minds. What can be more disreputable, and at the same time more distressing, than habitual obscenity, harsh threats, and immodest conduct, to delicate and inoffensive females? What can be more oppressive than to confine them to their cabins by threats of personal insult or injury? What more aggravating than a malicious tyranny which denies them every reasonable request, and seeks revenge by withholding suitable food and the common means of relief in cases of seasickness and ill health?" In the case of Nieto v. Clark, 1 Cliff. 145, Fed. Cas. No. 10,262, this decision of Judge STORY'S was cited with approval by Judge CLIFFORD. While it is true that in two cases cited the carrier whose liability was under consideration was a carrier by water, still the doctrine laid down in these cases has been followed in cases where suits were brought for wrongs of a similar nature inflicted upon passengers in a railway carriage. See Crake v. Railway Co., 36 Wis. 657; Railroad Co. v. Ballard, 85 Ky. 307, 3 S. W. 530.

Judgment affirmed. All the justices concurring.[1]

[1] See Haver v. Central Ry., 62 N. J. L. 282, 41 At. 916, 43 L. R. A. 84, 72 Am. St. R. 647, (1898), and cases cited therein.

§ 3D. MASTER'S TORT LIABILITY TO SERVANT.

PADMORE v. PILTZ.

(44 Fed. R. 104.—1890.)

HANFORD, J. This is a suit in *personam* against the master of an American vessel, to recover damages for an assault and battery. The proofs satisfy me that the libellant was employed as steward and cook on board the schooner called the "Robert Searles," and while so employed on a Sunday evening, at the port of Tacoma, in this District, on board of said vessel, the master twice requested this libelant to get him a cup of tea, and, upon said request being defiantly refused, went into the gallery, and there violently assaulted the libelant, striking heavy blows upon his head with a wooden belaying pin, from the effects of which the libelant was rendered insensible for a time and quite ill for several weeks, and there is some probability that said injuries may permanently incapacitate him from enduring continuously the fatigue and heat incident to engaging in his profession as cook. The only defense urged on the part of the master is that he acted within the limits of his lawful authority in chastising the libelant for willful disobedience of lawful commands, and that by accepting payment of the wages due him the libellant has released the master from all claims for damages.

On the facts, I hold that the libelant is entitled to recover as damages such a sum as will compensate him for the injury he received, and as will also in some degree punish the master for his malicious and unwarranted conduct in resorting to extreme violence and use of a dangerous weapon. The claim set up by this master that the law authorized him, at a civilized port, to punish disobedience of a cook by resort to measures only justifiable in case of an emergency and of actual insubordination by a member of the crew at a time of peril at sea, merits rebuke, and I regard it as an aggravation of the original offense. The proofs also clearly establish the libelant's claim for loss of part of his personal effects, which were in the vessel at the time of his injury, and were, in consequence of his inability to remove or secure them after being beaten until he was rendered insensible by the master, lost; the value being $86.50. * * * The court therefore awards the libelant damages for the personal injury in the sum of $1,500, and for loss of property in the further sum of $86.50, and costs.[1]

[1] *Cf.* The Agincourt, 1 Hagg. 271 (1824): Butler v. McClellan, 1 Ware (U. S.) 220 (1831); The Stacy Clarke, 54 Fed. 533 (1892). See Masters of Vessels, 20 Am. & Eng. Cyc. of Law. pp. 203–207 (2d Ed.)

§ 4.—SPECIAL DUTIES OF MASTERS TOWARDS SERVANTS. (1). TO EMPLOY SUITABLE FELLOW-SERVANTS.

THE ANTONIO ZAMBRANA.

OIEN v. THE ANTONIO ZAMBRANA.

(89 Fed. R. 60.—1898.)

THOMAS, District Judge. Upon a dark night, the mate of a ship advised the master thereof that the bow line holding the ship to a wharf in the city of New York had been thrown off the cleat on such wharf, whereupon the master directed the ship to be moved astern. The line, in fact, had not been thrown off by the person on the wharf who attempted the same; and the libelant, an able seaman, who had cast the turns of the line off the bitts on the ship, and had given it slack to enable it to be cast off the cleat, was in an unexplained way caught by the line running out, and grievously injured. The mate had been intoxicated during the afternoon, and had been taken in charge by the libelant, who endeavored to overcome his intoxication before the arrival of the master, who was absent, and did not appear until shortly before the accident, at which time the mate had in such measure recovered from his insobriety that it was not necessarily noticeable. The libelant contends that the injury was caused by the negligence of the mate; that his intoxication contributed to the negligence; that the master was negligent in continuing the mate in service, and committing to his supervision the work of casting off the line.

There are certain basic rules of law governing the relations of master and servant, which may be stated generally as follows: The master must use reasonable care to secure competent servants, and if, after such due care, he employ a servant, the master cannot be charged with injury to a co-servant arising from the incompetency of the servant so employed, unless the master knew, or in the exercise of ordinary care should have known, of such incompetency. Chapman v. Railroad Co., 55 N. Y. 579; Cameron v. Railroad Co., 145 N. Y. 400, 40 N. E. 1.; Park v. Railroad Co., 155 N. Y. 215, 219, 49 N. E. 674. The burden is on the injured servant to prove the master's negligence in employing or continuing the employment of an incompetent servant. Wright v. Railroad Co., 25 N. Y. 566; Gilman v. Eastern Railroad Corp., 10 Allen, 233; Davis v. Railroad

Co., 20 Mich. 105, 122. When a servant becomes incompetent, his co-servant, knowing thereof, assumes the risk of injury to himself arising from such incompetency, unless he notify the master of the same when he has a fair opportunity to do so. Davidson v. Railroad Co., 44 Fed. 476, 481; Kroy v. Railroad Co., 32 Iowa, 357; Youll v. Railroad Co., 66 Iowa, 346, 23 N. W. 736. The holding was correct in the dissenting opinion in Tonnesen v. Ross, 58 Hun, 415, 12 N. Y. Supp. 150, 151. It may be added that this assumption of the risk of such incompetency continues even after the master has been apprised thereof, if he continue the incompetent servant in his employment. This is qualified by the rule that, if the master hold out inducements to the co-servant to remain in his service, such co-servant may thereby be relieved from the risk of service with an incompetent person.

In the case at bar the libelant accuses the master of the ship of negligence in continuing the mate in his service, when, as it is charged, the mate was incompetent by reason of intoxication to perform his usual duties. The evidence shows that during the afternoon, in the absence of the master, the mate went ashore, and became intoxicated; but such intoxication had diminished to such an extent that to ordinary observation the insobriety was not noticeable. It does not appear that the master knew of the condition before the accident; and, indeed, he testifies that he did not, and several others, including the pilot, stated that the mate was apparently sober. But how can the libelant charge the master with negligence? He knew of the precise condition, whatever it was. He did not notify the master, but, on the other hand, he used efforts to keep the fact of the mate's intoxication from the master's knowledge, and gave as a reason that if the master had such knowledge, he would "chase him [the offending servant] ashore." Here is failure to notify, connivance at the transgression of the mate, and effort to prevent the master knowing a fact, the knowledge of which is made the present ground of the master's culpability. When a servant so acts, he assumes the risk of his co-servant's incompetency. A servant cannot conceal his co-servant's defects, and thereafter declare his master culpable because he did not see them. If the servant knows of defects in machinery, dangers connected with the place where he works, habits of his fellow-workmen which threaten his own safety, he may pursue one of two courses: (1) notify the

master, and wait for a reasonable time for the master to remove the dangerous condition; or (2) be silent, and take the risk.

In the present case the libelant aided the offending servant, shielded him from the master's observation, and hid his offense. So the case is this: The mate was negligent. His negligence possibly arose from his insobriety. His co-servant sought to screen his fault from discovery, and to prevent his discharge from the ship. Under such a state of facts, he cannot assert that the mate was an unfit servant, and that he should have been expelled from the ship for the very offense which the libellant concealed, or sought to conceal. Such conduct on the part of the libelant was a violation of his own duty and a waiver of his right to have his co-servant discharged or suspended from service for insobriety. The libelant testifies that he had served with the mate on previous voyages, and that, "the three last trips that I was on board, he was drunk every time," and that once he had seen him drunk in the presence of the master. The master denies knowledge of such intemperance. But it is enough that the libelant knew of it, and, after opportunities to leave the service, elected to continue the employment with such a co-servant; and if to this be added the fact, already discussed, that, at the very time when his intoxication is alleged to have contributed to the injury, the libelant condoned the offense, and shielded the offender, there can be no hesitation in deciding that the libelant assumed the risk of injury from the mate's habits and condition.

The libel must be dismissed.[1]

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§ 4. (2.)—DUTY TO FORMULATE RULES.

TEXAS & N. O. RY. CO. v. ECHOLS

(87 Tex. 339; 27 S. W. 60.—1894)

BROWN, J. The Texas & New Orleans Railway Company, jointly with other railroads, owned and operated creosote works near the city of Houston, for the purpose of treating ties. There was a large number of ties in the yard, stacked between two tracks, and extend-

[1] In Brown v. Levy, 108 Ky. 163, 55 S. W. 1079 (1900), the master was held liable for an injury to a servant, by the negligence of a fellow servant, whose incompetency had been brought to his notice, and whom he had promised to displace by a competent servant.

ing from near the one to near the other track. The south track was used to carry the ties to the works from the stacks by placing them on trucks or cars for that purpose, taking them from the stacks. The ties were in stacks about eight feet high, one tie upon another. The ties, from bottom to top of the stack, were called a "tier," and each tier was about eight feet long and eight inches wide. When the ties were brought into the yard for treatment, the cars were unloaded from the north track, and stacked, beginning near the south track, and extending back to a point within about four feet of the north track. There were two gangs of hands that worked at night removing the ties to the works, beginning at the south track, and taking them back to the north track. The hands employed on the night before the injury occurred removed all of a stack except about four or five tiers near to the north track, but left that remnant standing without bracing or other security against falling over. A gang of hands to which Echols belonged commenced work to unload a car of ties on the north track on the morning he was injured. Echols was employed on the 1st of March, and was injured on the 3d of that month. He had worked there for two or three months before that time; that is, at a time previous to this employment. Echols and his gang were ordered to push a car down the north track to an opening, and, a train following them, they walked on the side of the car to push it. When he (Echols) got opposite to the remnant of the stack left by the night gang, it fell towards him, and caught him between the car and the ties, breaking his leg.

He sued the Texas & New Orleans Railway Company for damages, alleging, among other things, that it was negligent in failing to make and enforce rules to govern the gang removing the ties to the works, in the performance of their work, and especially as to the manner in which remnants of stacks should be secured. He recovered judgment against the railroad company, which was affirmed by the court of civil appeals. The court of civil appeals found, as a conclusion from the evidence, that "the defendant had adopted no rules or precautions for the protection of the men unloading the cars against liability to injury from the falling of the remnant tiers of the stacks, and by which they would be left in a reasonably safe condition."

Plaintiff in error presents a number of objections to the judgment, but we will consider one only, as the others are either not

well taken or are embraced in the one considered. Defendant asked the court to give this charge to the jury: "The evidence being insufficient to warrant a verdict for the plaintiff, you will return a verdict for the defendant, the Texas & New Orleans Railroad Company." It was refused. There is no evidence of negligence on the part of the defendant, other than a failure to make rules to govern the hands as to what should be done to secure the remnant of stacks. We must consider this case, under the findings of the court and the manner of its presentation here, as if that finding was fully sustained by the evidence. Whether or not the evidence is sufficient to show a case in which the duty to make rules rested upon the defendant is a question of law for the court. If the facts raised that issue, it should have been submitted to the jury; otherwise it should not. When submitted to the jury, the reasonableness of such regulations is a question for the jury. The rule of law as to when it becomes the duty of the master to make rules for the safety of employees is well stated by Mr. Wood, in his work on Master and Servants, thus: "If a master is engaged in a complex business, that requires definite regulations for the safety and protection of his employees, a failure to adopt proper rules, as well as laxity in their enforcement, is negligence *per se*, and the establishment of defective or imperfect rules is such negligence as renders the master responsible for all injuries resulting therefrom." Wood, Master. & Serv. § 403; 3 Wood, Ry. Law, § 382.

This rule is quoted and approved in Reagan v. Railway Co., 93 Mo. 348, 6 S. W. 371, and in Morgan v. Iron Co. (N. Y. App.) 31 N. E. 234. This question has been before this court in the following cases: Railroad Co. v. Watts, 63 Tex. 552; Railroad Co. v. Smith, 76 Tex. 618, 13 S. W. 562; and Railroad Co. v. Hall, 78 Tex. 658, 14 S. W. 259. In the first case this court said: "Where the employee is engaged in a dangerous service, it is the duty of the master to use all reasonable and necessary means to protect him against any superadded danger that might be reasonably expected to arise from extrinsic causes; * * * for, having placed its servants at labor upon these repair tracks, it was incumbent upon the company to use due care in protecting them against danger arising from these extrinsic causes." In the other cases the court followed Railroad Co. v. Watts. It will be seen that the rule laid down is substantially the same as quoted from Wood on Master and Servants. In Railroad Co. v. Watts, 63 Tex. 552, the injured

party was engaged in repairing cars on a repair track, standing between the cars, when an engine backed down against the car at which he was employed, injuring him. Railroad Co. v. Hall, was a similar case; and in Railroad Co. v. Smith the plaintiff was on a train, on the road, and, for want of orders, the train collided with another train, whereby he was injured. In each of these cases the servants were engaged in hazardous employments, in which they were exposed to dangers arising from the acts of other employees, by which they were liable to injury, unless some system were adopted by which such employees would be warned of the approach of danger. In Abel v. President, etc., 103 N. Y. 581, 9 N. E. 325; Sheehan v. Railroad Co., 91 N. Y. 332; Railroad Co. v. Lavalley, 36 Ohio St. 221; Reagan v. Railroad Co., 93 Mo. 348, 6 S. W. 371 (quoted above); Morgan v. Iron Co. (N. Y. App.) 31 N. E. 234; and Corcoran v. Railroad Co., 126 N. Y. 673, 27 N. E. 1022,—the facts showed that the business in which the servants were engaged was of a hazardous nature. In all of these cases the same doctrine is announced.

We have carefully examined the authorities, and find no support for the proposition that in a business which involves no exercise of peculiar skill, in which there is in use no dangerous machinery, or that in itself does not involve extra hazard to the servant, an employer is required to make and enforce rules for the performance of the work. In this case the work to be done was of that character which could be performed and understood by any laborer of common intelligence. In its performance there was no danger greater than attends any work commonly done in the ordinary avocations of life. The reason for the rule requiring of the master the precaution of prescribing regulations for the discharge of such duties does not exist here, and therefore the rule does not apply to this case. The same requirements apply to all employers,—railroads, manufacturers, merchants, farmers,—and in fact in every branch of business, when the business is such that the danger to the servant exists by reason of the very nature of the service to be performed; and it applies to neither when that danger may not be reasonably anticipated on account of the character of the work. Suppose that a citizen of the city of Houston had been running a wood yard, with hands employed hauling and stacking cord wood, and at the same time other hands taking down the stacks of wood, and delivering it to customers. The same danger would exist as in this case,—that

a stack of wood eight feet high, left unsecured, with a narrow base, might fall upon one passing, in discharge of a duty, in the yard. The same reason for the owner of the wood yard to make rules for the performance of this duty would arise out of this state of facts. Indeed, there is scarcely an employment in which labor finds remuneration that is not attended by some dangers, arising out of the negligence of coemployees. The rule is a sound and salutary one, when applied to cases involving extra risks; but it would be burdensome to all characters of ordinary business if extended beyond the necessity out of which it originated.

There was no evidence in this case of negligence on the part of the railroad company, and the court erred in not giving the charge requested, for which error the judgments of the district court and court of civil appeals are reversed, and the cause remanded to the district court for trial.

LITTLE ROCK & M. R. CO. v. BARRY.

(84 Fed. 944; 56 U. S. App. 37.—1898.)

SANBORN, C. J. * * * At the close of the trial, the court should have instructed the jury that the system of rules, and practice under them, which the company had adopted, was neither unreasonable nor insufficient. The defendant in error and the other servants of the company were familiar with these rules, and the theory upon which they were based. By taking service under them without objection or protest, they assumed the risks and dangers of the theory that every employee who operates trains must beware of other trains moving in the same direction, without notice of their whereabouts, and the risks and dangers of the system of rules which was based upon this theory. Wolsey v. Railroad Co., 33 Ohio St. 227. When a railroad company has deliberately adopted a system of rules, which have been made familiar to its employees, and its railroad is operated under them, the reasonableness and sufficiency of these rules are questions of law, and not of fact. These questions must be determined by the court, because there is no other way in which a set of rules may ever be established or adjudicated as either reasonable or sufficient.

It may be said that trial judges often differ upon questions of this character. But the answer to this objection is that the Appellate Court will finally settle them, and in the end a substantial uniformity of decision as to the reasonableness and sufficiency of any set of rules in general use must eventually result, if these questions are left to the determination of the courts. If, on the other hand, they are remitted to the juries, their various findings can result in little less than confusion worse confounded. The decision of an Appellate Court becomes a precedent for the rulings of many inferior courts. But the finding of one jury is no precedent for the decision of another, and a rule that is found to be reasonable by one jury will frequently be thought to be unreasonable by another; and no criterion will ever be established by which railroad companies may measure their duties in this regard, if the reasonableness and sufficiency of their rules are to be daily submitted to new tribunals, which are governed by no precedent, and are without experience in the determination of these questions. We adhere to the view of this question expressed by Judge CALDWELL in the opinion of this court in Railway Co. v. Dye, 36 U. S. App. 23, 28, 16 C. C. A. 604, 607, and 70 Fed. 24, 27, which is supported by the following authorities, among others: Vedder v. Fellows, 20 N. Y. 126, 130; Railway v. Adcock, 52 Ark. 406, 410, 12 S. W. 874; Railway Co. v. Hammond, 58 Ark. 324, 334, 24 S. W. 723; Railroad Co. v. Whittemore, 43 Ill. 420, 423; Railroad Co. v. Fleming, 18 Am. & Eng. Ry. Cas. 347, 352; Tracy v. Railroad Co., 9 Bosw. 396, 398, 402; Hoffbauer v. Railroad Co., 52 Iowa, 342, 343, 3 N. W. 121.

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§ 4. (3.)—SAFE PLACE TO WORK.

CURLEY v. HOFF.

(62 N. J. L. 758; 42 At. 731.—1899.)

COLLINS, J. This writ of error brings before us exceptions to rulings made at the trial of an action brought by a servant against his master to recover damages for personal injuries sustained in the service, in which action the plaintiff prevailed. The defendant was engaged in constructing, for the county of Hudson, a public road, with a brick sewer therein. At the time the plaintiff was hurt, the

different branches of the work were in simultaneous progress under one foreman. As the trench for the sewer was excavated, it was sheathed with planks, held in place by rangers braced laterally across it. As it deepened, these planks were driven down further. Some rock was encountered, and this had to be removed by blasting. The plaintiff was one of two bricklayers engaged in building the sewer, following up the workmen engaged in making the trench. Shortly after a blast of rock, made at a point about 100 feet in advance of the bricklayers, the lower part of the bank on one side of the trench caved in upon and injured the plaintiff as he stooped to his work. At this place the sheathing had not been driven down to the bottom of the trench by some two or three feet, and there was more or less percolation of water, so that the first course of the sewer was being laid in mud. The fall of earth seems to have been due to the action of the water, aided, perhaps, by the jar of the blast. The learned judge who tried the cause refused to nonsuit the plaintiff. He instructed the jury that it is the duty of a master to exercise reasonable care to provide for his servant a safe place in which to work, and to keep it safe, and that he cannot delegate that duty so as to relieve himself of liability. This rule, he said, was subject to the qualification that the servant must assume the risk of obvious or incidental dangers and of his own negligence. In applying the rule to the case in hand, the judge instructed the jury that a delegation of such duty to the foreman would render his negligence imputable to the defendant; and on the assumption that it was the duty of the defendant to afford some protection against the caving in of the trench, and that he had undertaken to perform that duty by means of sheathing, the judge further instructed the jury that it was the duty of the defendant to exercise "reasonable care in the construction of that sheathing so as to make that place, so far as reasonable care could make it, a safe place for the workman to engage in his labor." Exceptions, duly sealed, present these rulings for review.

The general rule stated to the jury is well established. Recent assertions of it in this court are to be found in the cases of Comben v. Stone Co., 59 N. J. Law, 226, 36 Atl. 473, and Stone Co. v. Mooney, 61 N. J. Law, 253, 39 Atl. 764. Its application, however, often presents difficulty. Where the work and place of working are coincident, it seems to have little appropriateness. It is hard to see how, for example, where the work is excavation, the master is under any

duty to guard his servants against the very danger that arises from their work. The opinion read for this court in the case of Van Steenburgh v. Thornton, 58 N. J. Law, 160, 33 Atl. 380, seems to assert such a duty, but such is not the force of the decision as was pointed out in the Supreme Court in the later case of Regan v. Palo, 41 Atl. 364, where it was held that a servant takes the risk of the caving in of the walls of a trench he is digging unless there be a latent danger, which the master, with reasonable care, might have discovered. The facts recited in the report of the Van Steenburgh Case show that there was such a latent danger, knowledge of which was chargeable to the master, and therefore this court refused to disturb a verdict against him. The learned judge who delivered the opinion considered the case as one of duty to provide a safe place in which to work, but it is plain that the real duty neglected was the discovery of a latent danger. Had the plaintiff, in that case, been told of a buried water pipe, the presence of which made it unsafe to dig near it, he would have proceeded with the work at his own risk. The case was parallel to one decided at the same term, where the principle was declared that a master is bound "to use reasonable care to protect his servant from unnecessary risk, and is liable for damages occasioned to him through some latent danger of which he should have warned him." Telegraph Co. v. McMullen, 58 N. J. Law, 155, 33 Atl. 384. The declaration in the Van Steenburgh opinion that the master was bound by the negligence of the boss foreman was really without pertinence. The record then before the court shows that there was evidence sufficient to warrant the jury in finding that the master himself knew, or ought to have known, of the latent danger. His contract with the township bound him to protect water pipes, and a public map on file disclosed the existence of the water pipe that constituted the danger. This point was made in the brief filed in support of the judgment. The only exceptions on which error was assigned were to the refusal to nonsuit or direct a verdict for the defendant. Hence nothing was really decided beyond what those exceptions necessarily involved. Coming to a case where sheathing of a sewer trench is necessary or desirable, the rule of the master's duty to provide a safe place for working seems as little appropriate. The sheathing is a part of the work, and, where the earth is soft or friable, a necessary part, for without it there can be no trench. There should be no difference between the rule governing the construction

of a sewer and that governing the construction of any other work. The trench, sheathed or unsheathed, is a necessary part of such construction.

Another general rule, as well established as that under discussion, is that a master who has used due care in the selection and employment of his servants is not responsible for an injury done to one of them by the carelessness of another in the course of their common employment. The courts of this State have inflexibly adhered to this rule since its first formal assertion in Harrison v. Railroad Co., 31 N. J. Law, 293. It is as applicable to a case where the work involves the place of working as to any other. It has been properly applied by the Supreme Court in Gilmore v. Nail Co., 55 N. J. Law, 39, 25 Atl. 707, to a case of alleged negligent failure by a foreman to remove from the walls of a mine, in which the plaintiff was drilling holes for blasting, fragments of ore that had been loosened by previous blasts, one of which fragments fell upon and injured the miner; and in Maher v. McGrath, 58 N. J. Law, 469, 33 Atl. 945, to alleged negligent construction, by masons, of a scaffold, for their work, which fell with and injured a laborer delivering upon it brick for the wall being built by the masons. The court itself has unanimously applied it to the alleged negligent construction by ship carpenters of a scaffold necessary for the building of a vessel, where the scaffold fell and injured another carpenter standing upon it at work. Olsen v. Nixon (N. J. Err. & App.), 40 Atl. 694. The rule must be equally applicable to negligence in sheathing the sides of a sewer trench, there being, as in this case, no allegation or proof of carelessness in the selection or employment of servants, or that the foreman or workman were in fact incompetent.

The decision in Steamship Co. v. Ingebregsten, 57 N. J. Law, 400, 31 Atl. 619, does not conflict with the views above expressed. That decision related to mechanical appliances, not a place of working. But the rule of the master's duty is the same in both cases, viz., a reasonable care for the servant's safety. While delegation to others will not relieve the master from the consequences of negligence in the performance of what the law makes the master's duty, it will not charge upon the master the consequences of the negligence of his servants towards each other. The risk of that negligence, for reasons of public policy, the law places on the servants. The test always must be whether the negligent act or omission was in dis-

charge of the master's or the servant's duty. Smith v. Iron Co., 42 N. J. Law, 467. In the Ingebregsten Case it was acknowledged that inspection incidental to use of a tool or appliance was the servant's, not the master's, duty. So in the case in hand the keeping safe a place of working incidental to the work itself was the servant's, not the master's, duty.

This distinction is well illustrated by a decision of the New York Court of Appeals. A laborer was employed in breaking out and loading lumps of clay. The clay bank overhung him, but was safe as long as it was undisturbed. In the progress of the work the foreman weakened the cohesion of the bank above the laborer, and it fell upon and injured him. It was held that the master was not liable. Loughlin v. State, 105 N. Y. 159, 11 N. E. 371. In a leading case in England it was decided that, while the owners of a mine were bound to use reasonable care to provide a proper system of ventilation, so as to prevent accumulation of fire damp, they were not responsible for the negligence of their underground manager in obstructing the free working of the system by a scaffold set up to reach a coal seam. Wilson v. Merry, L. R. 1 H. L. Sc. 326. In this case Lord CHELMSFORD'S opinion is very convincing, both as to the distinction drawn and as to the manager's being a fellow servant with the miners. A well-considered opinion of the same purport is that of GRAY, C. J., in Holden v. Railroad Co., 129 Mass. 268. Of course, a master must use reasonable care to furnish sufficient and suitable materials for what is essential to a given piece of work; but, when he performs that duty, a failure to use them, or negligence in their use, is not chargeable to him. McLaughlin v. Iron Works, 60 N. J. Law, 557, 38 Atl. 677. In the later case of Day v. Donohue (N. J. Err. & App). 41 Atl. 934, where a bricklayer was injured through the falling of a scaffold, submission to the jury of the servant's claim against the master was justified because the putlog that broke was defective, and unfit for the use for which he had furnished it.

In the case now before us the proximate cause of the injury was the neglect to drive down the sheathing planks to the bottom of the trench, or, perhaps, the placing of the planks too far apart. There was no lack or inadequacy of materials for sheathing and bracing. The fault, if any, was entirely with the servants engaged in the work, and not with the master. The foreman in this regard was a fellow servant with the plaintiff. O'Brien v. Dredging Co., 53 N. J. Law,

291, 21 Atl. 324; Gilmore v. Nail Co., *ubi supra;* Maher v. Thropp 59 N. J. Law, 186, 35 Atl. 1057; McLaughlin v. Iron Works, 60 N. J. Law, 557, 38 Atl. 677; Olsen v. Nixon, *ubi supra;* Loughlin v. State, *ubi supra;* Wilson v. Merry, *ubi supra.*

The only question possible to raise in this case is as to whether the plaintiff, in laying the sewer, was in a common employment with the workmen who did the sheathing. I can conceive of cases where a servant following up work of other servants of the same master may be injured through the result of their negligence, and yet have a remedy against the master for neglect of duty to use reasonable care to provide a safe place for working. No general rule can be formulated that will fit every case. A jury question may, perhaps, arise on that subject. In this case the trial judge treated the question as a legal one, and, I think, decided it wrongly. A bricklayer building a sewer as the excavation and sheathing of the trench proceeds is unquestionably engaged in a common employment with the workmen constructing the trench. The contract for road and sewer was an entirety, and all the men worked together for the common design. In Olsen v. Nixon, *ubi supra,* the servant injured was employed after the scaffold that broke was constructed, yet he was held to have been in the common employment and without remedy.

There was, therefore, error in putting the case to the jury as one in which it was possible to find a breach of the master's duty, or one in which the foreman's negligence was imputable to the master. But, even if this were not so, the plaintiff should nevertheless have been barred of recovery, for the reason that the undisputed facts brought him within the conceded qualification of the rule invoked, viz., that the servant assumes all obvious risks. The plaintiff knew better than any one that the sheathing at the place where he was working had not been driven down; and if, as was claimed by some witnesses, the planks were not close to one another, he also knew that fact. His work was at the very bottom of the trench, and he was experienced in the work. One of his witnesses was the county's inspector, and he testified that the bracing, as he called it, was done upon consultation with the plaintiff. The plaintiff knew of the percolation of water, for he laid his bricks in the mud. He knew, of course, that blasting was in progress, for it was frequent; and the custom was to give warning to leave the trench when the blast was fired, in order to avoid danger from the flying rock. At the blast

just before the accident the usual warning was given, and, although defendant's witnesses said that the plaintiff disregarded the warning, and remained at work, he himself testified that he left the trench, and returned after the explosion, and was just resuming his work, when the bank fell or slid upon him. He further testified that, according to his custom, he looked at the bank as he passed down into the trench after the explosion, and that it looked all right. He therefore deliberately assumed the risk of remaining at work.

There must be a reversal, and a *venire de novo*.

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§ 4. (4.)—SAFE APPLIANCES.

ANDERSON v. ERIE R. CO.

(68 N. J. L. 647; 54 At. 880.—1903.)

DIXON, J. The plaintiff, a brakeman in the employ of the defendant, fell, and was injured while descending from a box car in the defendant's yard at Weehawken. The cause of his fall was that the fastening of the grab iron on top of the car gave way as he threw his weight upon it. The evidence tended to show two defects in the fastening—one, the use of a screw running less than an inch into the wooden roof, instead of a larger screw, or a bolt running entirely through the roof, and held by a nut underneath; the other, deterioration of the wood through which the screw ran, indicated by the fibers adhering to the thread of the screw after it was wrenched away. It was proved that the car did not belong to the defendant, but was the property of the Chicago & Erie Railway Company, an Indiana corporation owning and operating a railroad from Hammond, Ind., to Marion, Ohio; that at 12:10 A. M. on June 2, 1901, the car arrived loaded at Port Jervis, coming in a train of sixty freight cars from the west over the Delaware Division on the defendant's road; that it was there inspected by the defendant's inspectors, found satisfactory, and made up by the defendant in another train, which left Port Jervis at 9:30 that evening, and reached the Weehawken yard at 10:55 the next morning. The accident happened about noon the same day. There is no direct testimony in the case as to where, or by whom, the car was loaded, but

we think the only legitimate inference is that it came loaded into the possession of the defendant for transportation by it as a common carrier. The fact that it was the property of another owner rebuts any presumption which might arise from possession that it was used by the defendant in its own business, and this rebuttal is strengthened by the further fact that when it first appears in the defendant's possession it was fully loaded, and was afterwards handled by the defendant merely for transportation.

The general principles of the law cast upon the plaintiff the burden of proving the duty of the defendant, and we think he sustained this burden only to the extent of such duty as rests upon a railroad company which receives a loaded car of another owner, to be hauled by the company to the place of destination. The nature of that duty has been the subject of considerable judicial comment. 20 Am. & Eng. Enc. Law (2d Ed.) 80. All authorities agree that it requires the exercise of reasonable care for the safety of employees, but they are not all agreed as to the nature of the care demanded. Sometimes it has been held that the duty was co-extensive with the duty of the company respecting its own cars. O'Neil v. St. Louis, etc., Ry. Co. (C. C.), 9 Fed. 337, 3 McCrary, 423; Felton v. Bullard, 37 C. C. A. 1, 94 Fed. 781; Jones v. N. H. & H. R. R. Co., 20 R. I. 210, 37 Atl. 1033. In Massachusetts the rule is said to require only the employment of competent inspectors, who are to be deemed fellow servants of those managing the train, and for whose neglect, therefore, the company is not responsible to its employees. Mackin v. Boston & Albany R. R. Co., 135 Mass. 201, 46 Am. Rep. 456; Bowers v. Conn. River R. R. Co., 162 Mass. 312, 38 N. E. 508.

We think, however, that the weight of reason and authority is in favor of these propositions: First. That on receiving a car for transportation, the company is entitled to assume that the car had been properly constructed of suitable materials for all the purposes for which the owner intended it to be used. Ballou v. Chicago, etc., R. R. Co., 54 Wis. 259, 11 N. W. 559, 41 Am. Rep. 31; Gutridge v. Mo. Pac. Ry. Co., 94 Mo. 468, 7 S. W. 476, 4 Am. St. Rep. 392. Second. That on receiving the car the company is bound to make such examination as would be likely to discover conditions rendering a car so constructed unfit for safe transportation on the company's line. This examination has been called a "cursory examination," an examination not of a very minute character, Richardson v. Great Eastern Ry. Co., 1 C. P. Div. 342, an inspection for defects

visible or discernible by ordinary examination, Eaton v. N. Y. Cent. & H. R. R. Co., 163 N. Y. 391, 57 N. E. 609, 79 Am. St. Rep. 600; Gottlieb v. N. Y., Lake Erie & W. R. R. Co., 100 N. Y. 466, 3 N. E. 344; Dooner v. Del. & Hud. Canal Co., 164 Pa. 17, 30 Atl. 269; Balt. & Pot. R. R. Co. v. Mackey, 157 U. S. 72, 15 Sup. Ct. 491, 39 L. Ed. 624. And, third, that, at convenient places during the journey, the company is bound to make the same inspection and tests of such a car, as it should make of its own car for the purpose of discovering defects likely to occur in the course of transportation.

Under these rules we are unable to discern any evidence of fault in the defendant contributing to the plaintiff's accident. The defect of which he complains respecting the screw used to fasten the grab iron was one in construction, which the defendant had a right to assume did not exist; and the same statement is probably true regarding the unsoundness of the wood. Neither of these defects was discoverable by ordinary inspection, or by anything short of a very minute examination, and neither of them could occur in the course of transportation.

We therefore conclude that the motion to direct a verdict for the defendant should have been granted, and because of its refusal the judgment of the plaintiff must be reversed, and a venire *de novo* awarded.

TRIMBLE v. WHITIN MACH. WORKS.

(172 Mass. 150, 51 N. E. 463.—1898.)

MORTON, J. We understand that the only defect complained of was the want of a gang plank at the side door of a car, while the plaintiff was helping to load the machine. If we assume, without deciding, that a gang plank was a part of the ways, works, and machinery, there is nothing to show that the defendant had not furnished a suitable gang plank. If the defendant furnished a suitable gang plank, it was not bound to see that it was properly placed at the door while the men were putting the machine into the car. It would have performed its duty in furnishing the gang plank. Robinson v. Manufacturing Co. 143 Mass. 528, 10 N. E. 314; Ashley v. Hart, 147 Mass. 573, 18 N. E. 416; Thyng v. Railroad Co., 156 Mass. 13, 30 N. E. 169; Carroll v. Telegraph Co., 160 Mass. 152, 35 N. E. 456; Allen v. Iron Co., 160 Mass. 557, 36 N. E. 581. Under the circumstances indicated, the putting of the gang plank in place

was the work of the men themselves, or it belonged to some superintendent or foreman of the defendant to see to it. If it was the former, then it is clear that the defendant is not liable to the plaintiff for an injury occurring through the failure or neglect of the plaintiff or his fellow workmen to do something which he or they ought to have done. Nobody is referred to in the exceptions as superintendent, and the only person who is referred to in them as a foreman is Mr. Cram. But there is nothing to show whether his sole or principal duty was that of superintendence, or whether it was a part of his duty to see that the gang plank was in place at the side door of the car while the men were loading the machine. It does not even clearly appear that he was a foreman of the defendant, though perhaps that might be fairly presumed. Therefore, even though we make in the plaintiff's favor the assumption which we have made, he fails on this branch of the case.

The result is that the exeception must be overruled. So ordered.[1]

[1] In Port Blakely Mill Co. v. Garrett, 97 Fed. 537, (1899), the court said: "Applying the principles of these decisions to the facts in the case before us, the conclusion follows that it was the duty of the plaintiff in error to see that the lumber car was in safe condition for operation before it was put into service on the day of the accident, and the delegation of this duty to a fellow servant of the deceased did not relieve the master from liability. This duty required that there should be provided a lumber car in safe condition for service, including side stakes of proper material and sufficient number. The car was not completely equipped for the safe transportation of lumber without them. They take the place of permanent sides or restraining appliances, and are only made detachable to allow the car to be used for other purposes. This very point was an issue in the case of Railroad Co. v. La Rue, 27 C. C. A. 363, 81 Fed. 148, where the court held that, "in the case of a low-sided gondola car employed in the transportation of lumber, side standards to keep the load in place, whether such standards are for constant use, and permanently attached to the car by chains, or are unattached and intended for use on a single occasion, are appliances necessary for the proper equipment of the car, and as essential to the safe transportation of the load as is a proper car body. These side standards, to all intents and purposes, are part of the car,"—citing, to the same effect, Bushby v. Railroad Co., 107 N. Y. 374, 14 N. E. 407. We discover no error in the instructions or in the rulings of the court below. The judgment is therefore affirmed."

In the case of Goldie v. Warner, 151 Ill. 551, 38 N. E. 95, it was held that a servant, in order to recover for a failure of the master to provide him with safe appliances, which includes a safe place in which to work (Hess v. Rosenthal, 106 Ill. 621, 43 N. E. 743), must establish, first, that the appliance was defective; second, that the master had notice thereof, or knowledge, or ought to have had; third, that the servant did not know of the defect, and had not equal means of knowing with the master.

§ 4. (5.)—DUTY TO WARN OF DANGER.

TEDFORD v. LOS ANGELES ELECTRIC CO.

(134 Cal. 76; 66 Pac. 77.—1901.)

MCFARLAND, J. This is an action to recover damages for personal injuries alleged to have been suffered by plaintiff through the negligence of defendant. The jury returned a verdict for the plaintiff in the sum of $15,000. Defendant appeals from an order denying its motion for a new trial.

Defendant is a corporation engaged in furnishing, carrying, and distributing electricity through the city of Los Angeles for lighting, motive power, etc., over poles and runnning wires along the streets and public places of said city. Plaintiff was an employee of defendant, and at the time when the injuries complained of were received was at work, about 18 feet above the ground, on one of the poles of defendant's system. He was standing on a small platform attached to the pole, and was engaged in scraping one of the wires, when he suddenly fell to the ground, and was badly injured. It is not contended that the place where plaintiff was working was unsafe on account of its height, or for any defect in the platform. It is averred, however, in the complaint, that his fall was caused by a strong electrical shock, which rendered him unconscious, and threw him backwards to the ground; and there was sufficient evidence to warrant the jury in finding that this averment was true. At the time of the accident, plaintiff was working under the directions of one Burge, who was a foreman in charge of a gang of men of which plaintiff was one, and at this time Burge was himself working on the same pole, several feet above the platform on which plaintiff stood. The evidence does not make it entirely clear how the current of electricity came in contact with plaintiff's person. It is averred in the complaint that at the time plaintiff reached the platform there was a strong current running at that point through the wires, parts of which were not insulated. Defendant contends that this was not true; that the wires then were all "dead"; and that, if plaintiff was touched by a current at all, such current was turned on afterwards by the said Burge. And therefore defendant contends that, if plaintiff was injured at all by a current of electricity which was negligently permitted to pass through the wires where he was work-

ing, the negligence was that of Burge; that the latter was a co-employee and fellow servant with plaintiff; and that plaintiff cannot recover of the employer, the defendant, for injuries caused by the negligence of the fellow servant, Burge.

There is no doubt that plaintiff and Burge were, in a general sense, fellow servants. This relation between them was not changed by the fact that Burge occupied a superior position in the general service. Donovan v. Ferris, 128 Cal. 48, 60 Pac. 519, and cases there cited. If, therefore, plaintiff was injured by the negligence of Burge, and the negligence did not involve a duty which the defendant, as employer, owed personally to plaintiff, as employee, then the offending fellow servant was alone responsible, and the judgment against defendant was unwarranted, as there is no claim that there was any want of care in selecting Burge, or that he was in any way incompetent. But there are certain duties which an employer owes personally to his employees, and he cannot avoid responsibility for injury to one servant, caused by the failure to perform such duties by delegating their performance to another servant. In such case the fellow servant to whom the performance of such duties is assigned becomes, with respect to that particular duty, the special representative of the employer,—sometimes called a vice principal. In such case the negligence of the servant is the negligence of the principal, for which the latter must answer. See Davis v. Pacific Co., 98 Cal. 13, 32 Pac. 646; Callan v. Bull, 113 Cal. 593, 45 Pac. 1017; Elledge v. Railway Co., 100 Cal. 282, 34 Pac. 720; Nixon v. Selby Co., 102 Cal. 458, 36 Pac. 803.

Some of such duties, well established in the law, are to furnish proper machinery and appliances and keep them in repair, to exercise care in selecting competent servants, to take reasonable care for the safety of the employees, etc. It is also one of these duties to give careful instructions, directions, and warnings to a youthful or inexperienced servant of unusual and hidden dangers of which the employer is aware, and of which the servant, to the employer's knowledge, is ignorant. Ingerman v. Moore, 90 Cal. 410, 27 Pac. 306, and authorities there cited; Ryan v. Los Angeles Co., 112 Cal. 244, 44 Pac. 471, 32 L. R. A. 524; Gibson v. Furniture Co., 113 Cal. 1, 45 Pac. 5; Verdelli v. Commercial Co., 115 Cal. 517, 47 Pac. 364; Higgins v. Williams, 114 Cal. 176, 45 Pac. 1041; Mullin v. Horseshoe Co., 105 Cal. 77, 38 Pac. 535; Hanley v. Construction Co., 127 Cal. 232, 59 Pac. 577. And in such case the employer cannot escape

the responsibility by delegating this duty to a fellow servant of the person injured. See cases above cited. Now, in the case at bar it is averred in the complaint that plaintiff was employed by defendant as a common, unskilled laborer, to do "the ordinary work of digging holes for electric poles, repairing electric poles, driving a horse and wagon, and in performing other street work for the maintenance of said poles and wires used in said business of the defendant; and said work was not of a skilled kind, nor was said work of a dangerous character." It is further averred that the work of a "lineman" in defendant's business required great skill and care, and was of a dangerous character; that the dangerous character of such work was well known to defendant, but that plaintiff was wholly unacquainted with the duties and dangers of such work, and wholly unskilled therein,—"all of which was at all times herein stated known to said defendant; and said plaintiff did not know, nor was he ever informed by said defendant, nor by any one else, of the dangerous character of such work, nor of the risk incident thereto." And it is further averred that, being thus, to defendant's knowledge, inexperienced, and ignorant of the dangers of the work of a lineman upon wires, he was, without any instructions or warning, and without being furnished with rubber gloves or other protective appliances used by linemen, negligently ordered by defendant to ascend said pole and scrape the wires. While there was some conflict in the testimony as to some of these averments, there was sufficient evidence to warrant the jury in finding that they were true; and, this being so, it was the duty of defendant to inform and warn plaintiff of the peril to which he ignorantly exposed himself by coming in contact with an invisible and dangerous electrical current. The contention, therefore, that under the law the verdict was not warranted by the evidence, cannot be maintained.

DALY v. KIEL.

(106 La. 170; 30 So. 254.—1901)

BLANCHARD, J. * * * The principle that the servant assumes the ordinary risks and dangers of his employment, and cannot hold the master responsible for an injury sustained in consequence of

one of the risks incident to the service in which he engages, is recognized; but this case is regarded as not being within the rule. One cannot be understood as contracting to take upon himself risks of which he has not been informed or warned against. Stucke v. Railroad Co., 50 La. Ann. 189, 23 South. 342. Telling the plaintiff simply to keep two eyes on him (the engineer) and one on the bank, or one on him and two on the bank, is not deemed a sufficient explanation to a new hand of the danger to be apprehended from the bank. The words did not clearly convey the meaning which might have been intended. At most, they left it to inference to be drawn by plaintiff that he meant the bank was expected to cave, to look out for its fall, and avoid it. It should not have been left to inference. The situation should have been explained, the danger pointed out, and unequivocally warned against. Myhan v. Power Co. 41 La. Ann. 964, 6 South. 799.

Plaintiff should have been given to understand clearly by plain words that the bank was dangerous, and he must first of all be on his guard against it. To a workman who had had experience the words of the engineer might have sufficed; to one who had only entered the service that moment, and who was injured within an hour of accepting the employment, they are held insufficient. In not thus definitely warning the plaintiff, the master subjected his servant to greater risks than fairly pertained to the employment, and this constitutes negligence which entitles the servant to recover. 41 La. Ann. 966, 6 South. 799; Lynn v. Lumber Co., 105 La. 451, 29 South. 874. The facts of this case distinguish it from the Gravel Pit Cases cited by defendant, and found in Griffin v. Railway Co., 124 Ind. 326, 24 N. E. 888, and Naylor v. Railway Co., 53 Wis. 661, 11 N. W. 24.[1]

[1] In Juchatz v. Michigan Alkali Co., 120 Mich. 654; 79 N. W. 907 (1899), the court said: It will appear, from what we have already said, that the mechanism which held the elevator in place was a simple contrivance. It was in plain view. The plaintiff used it constantly. He was the last person to use it before the accident occurred. He had the same opportunities to know its condition that any one would have. If it was defective, the plaintiff, if he had exercised the care, prudence, and observation which the employee should use in relation to the machinery he uses, should have seen the defect. "It is the duty of the servant to exercise care to avoid injuries to himself. He is under as great obligations to provide for his own safety from such dangers as are known to him, or are discernible by ordinary care on his part, as the master is to provide for him. *He must take ordinary care to learn the dangers which are likely to beset him in the service.* He must not go blindly to his

§ 4 (6).—ASSUMPTION OF RISK.

H. W. DAVIS COAL CO. v. POLLAND.

(Reported *Supra*, p. 284)

CHOCTAW, OKLAHOMA & C. RY. v. McDADE.

(Reported *Supra*, p. 290)

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§ 4 (7).—FELLOW SERVANTS.

FARWELL v. BOSTON & WOR. RY.

(4 Met. (Mass.) 49.—1849.)

SHAW, C. J. This is an action of new impression in our courts, and involves a principle of great importance. It presents a case where two persons are in the service and employment of one company, whose business it is to construct and maintain a railroad, and to employ their trains of cars to carry persons and merchandise for hire. They are appointed and employed by the same company to perform separate duties and services, all tending to the accomplish-

work where there is danger. He must inform himself. This is the law everywhere." Bailey, Mast. Liab. 159. See Deer. Neg. § 210; Pilucki v. Spring Works, 75 N. W. 295; Lamotte v. Boyce, 105 Mich. 545, 63 N. W. 517; Sakol v. Rickel, 113 Mich. 476, 71 N. W. 833; Soderstrom v. Lumber Co., 114 Mich. 83, 72 N. W. 13. The accident was an unfortunate one, and greatly to be regretted, but it did not occur under such circumstances as to give plaintiff a cause of action against the defendant. Judgment is affirmed.

In Gay's Adm'r v. Southern Ry. Co., 101 Va. 466, 44 S. E. 707 (1903), the court declared "that it is the duty of the master to inform the employee of the nature of the risk and peril to be incurred in the course of his employment, but not as to a special danger which springs out of a particular fact, which in its details cannot be anticipated."

In Omaha Bottling Co. v. Theiler, 59 Neb. 257, 80. N. W. 821, 80 Am. St. R. 673 (1899), the court said: "There is another reason why the plaintiff is not entitled to recovery. The duty to warn him of latent dangers, if any there were, was not an absolute one. The defendant was only required to do what a prudent master naturally would do under like circumstances."

ment of one and the same purpose,—that of the safe and rapid transmission of the trains; and they are paid for their respective services according to the nature of their respective duties, and the labor and skill required for their proper performance. The question is whether, for damages sustained by one of the persons so employed, by means of the carelessness and negligence of another, the party injured has a remedy against the common employer. It is an argument against such an action, though certainly not a decisive one, that no such action has before been maintained.

It is laid down by Blackstone, that if a servant, by his negligence, does any damage to a stranger, the master shall be answerable for his neglect. But the damage must be done while he is actually employed in the master's service; otherwise the servant shall answer for his own misbehavior. 1 Bl. Com. 431; M'Manus v. Crickett, 1 East, 106. This rule is obviously founded on the great principle of social duty, that every man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it. If done by a servant, in the course of his employment, and acting within the scope of his authority, it is considered, in contemplation of law, so far the act of the master that the latter shall be answerable *civiliter*. But this presupposes that the parties stand to each other in the relation of strangers, between whom there is no privity; and the action, in such case, is an action sounding in tort. The form is trespass on the case, for the consequential damage. The maxim *respondeat superior* is adopted in that case from general considerations of policy and security.

But this does not apply to the case of a servant bringing his action against his own employer to recover damages for an injury arising in the course of that employment, where all such risks and perils as the employer and the servant respectively intend to assume and bear may be regulated by the express or implied contract between them, and which, in contemplation of law, must be presumed to be thus regulated.

The same view seems to have been taken by the learned counsel for the plaintiff in the argument; and it was conceded that the claim could not be placed on the principle indicated by the maxim *respondeat superior*, which binds the master to indemnify a stranger for the damage caused by the careless, negligent, or unskillful act

of his servant in the conduct of his affairs. The claim, therefore, is placed, and must be maintained, if maintained at all, on the ground of contract. As there is no express contract between the parties, applicable to this point, it is placed on the footing of an implied contract of indemnity, arising out of the relation of master and servant. It would be an implied promise, arising from the duty of the master to be responsible to each person employed by him, in the conduct of every branch of business, where two or more persons are employed, to pay for all damage occasioned by the negligence of every other person employed in the same service. If such a duty were established by law,—like that of a common carrier, to stand to all losses of goods not caused by the act of God or of a public enemy, or that of an innkeeper, to be responsible, in like manner, for the baggage of his guests,—it would be a rule of frequent and familiar occurrence; and its existence and application, with all its qualifications and restrictions, would be settled by judicial precedents. But we are of opinion that no such rule has been established, and the authorities, as far as they go, are opposed to the principle. Priestley v. Fowler, 3 Mees. & Welsb, 1; Murray v. South Carolina Railroad Company, 1 McMullan, 385.

The general rule resulting from considerations as well of justice as of policy is that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and, in legal presumption, the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those who are in the same employment. These are perils which the servant is as likely to know, and against which he can as effectually guard, as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the the rate of compensation as any others. To say that the master shall be responsible because the damage is caused by his agents, is assuming the very point which remains to be proved. They are his agents to some extent, and for some purposes; but whether he is responsible, in a particular case, for their negligence, is not decided by the single fact that they are, for some purposes, his agents. It seems to be now well settled, whatever might have been thought formerly, that underwriters cannot excuse themselves from payment of a loss by one of the perils insured against, on the ground

that the loss was caused by the negligence or unskillfulness of the officers or crew of the vessel, in the performance of their various duties as navigators, although employed and paid by the owners, and, in the navigation of the vessel, their agents. Copeland v. New England Marine Ins. Co., 2 Met. 440–443, and cases there cited. I am aware that the maritime law has its own rules and analogies, and that we cannot always safely rely upon them in applying them to other branches of law. But the rule in question seems to be a good authority for the point that persons are not to be responsible, in all cases, for the negligence of those employed by them.

If we look from considerations of justice to those of policy, they will strongly lead to the same conclusion. In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned. This is, in truth, the basis on which implied promises are raised, being duties legally inferred from a consideration of what is best adapted to promote the benefit of all persons concerned, under given circumstances. To take the well-known and familiar cases already cited: a common carrier, without regard to actual fault or neglect in himself or his servants, is made liable for all losses of goods confided to him for carriage, except those caused by the act of God or of a public enemy, because he can best guard them against all minor dangers, and because, in case of actual loss, it would be extremely difficult for the owner to adduce proof of embezzlement, or other actual fault or neglect on the part of the carrier, although it may have been the real cause of the loss. The risk is therefore thrown upon the carrier; and he receives, in the form of payment for the carriage, a premium for the risk which he thus assumes. So of an innkeeper; he can best secure the attendance of honest and faithful servants, and guard his house against thieves. Whereas, if he were responsible only upon proof of actual negligence, he might connive at the presence of dishonest inmates and retainers, and even participate in the embezzlement of the property of the guests, during the hours of their necessary sleep, and yet it would be difficult, and often impossible, to prove these facts.

The liability of passenger carriers is founded on similar considerations. They are held to the strictest responsibility for care, vigilance, and skill, on the part of themselves and all persons

employed by them, and they are paid accordingly. The rule is founded on the expediency of throwing the risk upon those who can best guard against it. Story on Bailments, § 590 *et seq.*

We are of opinion that these considerations apply strongly to the case in question. Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity, or neglect of duty, and leave the service, if the common employer will not take such precautions, and employ such agents, as the safety of the whole party may require. By these means, the safety of each will be much more effectually secured than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other. Regarding it in this light, it is the ordinary case of one sustaining an injury in the course of his own employment, in which he must bear the loss himself, or seek his remedy, if he have any, against the actual wrongdoer.

In applying these principles to the present case, it appears that the plaintiff was employed by the defendants as an engineer, at the rate of wages usually paid in that employment, being a higher rate than the plaintiff had before received as a machinist. It was a voluntary undertaking on his part, with a full knowledge of the risks incident to the employment; and the loss was sustained by means of an ordinary casualty, caused by the negligence of another servant of the company. Under these circumstances, the loss must be deemed to be the result of a pure accident, like those to which all men, in all employments, and at all times, are more or less exposed; and, like similar losses from accidental causes, it must rest where it first fell, unless the plaintiff has a remedy against the person actually in default, of which we give no opinion.

It was strongly pressed in the argument that although this might be so, where two or more servants are employed in the same department of duty, where each can exert some influence over the conduct of the other, and thus to some extent provide for his own security, yet that it could not apply where two or more are employed in different departments of duty, at a distance from each other, and when one can in no degree control or influence the conduct of another. But we think this is founded upon a supposed distinction, on which it would be extremely difficult to establish a practical rule.

When the object to be accomplished is one and the same, when the employers are the same, and the several persons employed derive their authority and their compensation from the same source, it would be extremely difficult to distinguish what constitutes one department and what a distinct department of duty. It would vary with the circumstances of every case. If it were made to depend upon the nearness or distance of the persons from each other, the question would immediately arise, how near or how distant must they be to be in the same or different departments. In a blacksmith's shop, persons working in the same building, at different fires, may be quite independent of each other, though only a few feet distant. In a ropewalk several may be at work on the same piece of cordage, at the same time, at many hundred feet distant from each other, and beyond the reach of sight and voice, and yet acting together.

Besides, it appears to us that the argument rests upon an assumed principle of responsibility which does not exist. The master, in the case supposed, is not exempt from liability because the servant has better means of providing for his safety when he is employed in immediate connection with those from whose negligence he might suffer, but because the implied contract of the master does not extend to indemnify the servant against the negligence of any one but himself; and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract, express or implied. The exemption of the master, therefore, from liability for the negligence of a fellow-servant, does not depend exclusively upon the consideration that the servant has better means to provide for his own safety, but upon other grounds. Hence the separation of the employment into different departments cannot create that liability when it does not arise from express or implied contract, or from a responsibility created by law to third persons and strangers for the negligence of a servant.

A case may be put for the purpose of illustrating this distinction. Suppose the road had been owned by one set of proprietors whose duty it was to keep it in repair, and have it at all times ready and in fit condition for the running of engines and cars, taking a toll, and that the engines and cars were owned by another set of proprietors, paying toll to the proprietors of the road, and receiving compensation from passengers for their carriage; and suppose the engineer to suffer a loss from the negligence of the switch-tender.

We are inclined to the opinion that the engineer might have a remedy against the railroad corporation; and, if so, it must be on the ground that as between the engineer employed by the proprietors of the engines and cars, and the switch-tender employed by the corporation, the engineer would be a stranger, between whom and the corporation there could be no privity of contract, and not because the engineer would have no means of controlling the conduct of the switch-tender. The responsibility which one is under for the negligence of his servant, in the conduct of his business, towards third persons, is founded on another and distinct principle from that of implied contract, and stands on its own reasons of policy. The same reasons of policy, we think, limit this responsibility to the case of strangers, for whose security alone it is established. Like considerations of policy and general expediency forbid the extension of the principle, so far as to warrant a servant in maintaining an action against his employer for an indemnity which we think was not contemplated in the nature and term of the employment, and which, if established, would not conduce to the general good.

In coming to the conclusion that the plaintiff, in the present case, is not entitled to recover, considering it as in some measure a nice question, we would add a caution against any hasty conclusion as to the application of this rule to a case not fully within the same principle. It may be varied and modified by circumstances not appearing in the present case, in which it appears that no willful wrong or actual negligence was imputed to the corporation, and where suitable means were furnished and suitable persons employed to accomplish the object in view. We are far from intending to say that there are no implied warranties and undertakings arising out of the relation of master and servant. Whether, for instance, the employer would be responsible to an engineer for a loss arising from a defective or ill-constructed steam-engine; whether this would depend upon an implied warranty of its goodness and sufficiency, or upon the fact of willful misconduct or gross negligence on the part of the employer, if a natural person, or of the superintendent or immediate representative and managing agent in case of an incorporated company—are questions on which we give no opinion. In the present case the claim of the plaintiff is not put on the ground that the defendants did not furnish a sufficient engine, a proper railroad track, a well-constructed switch, and a person of suitable skill and experience to attend it; the gravamen of the complaint

is that that person was chargeable with negligence in not changing the switch, in the particular instance, by means of which the accident occurred by which the plaintiff sustained a severe loss.

It ought, perhaps, to be stated, in justice to the person to whom this negligence is imputed, that the fact is strenuously denied by the defendants, and has not been tried by the jury. By consent of the parties, this fact was assumed without trial, in order to take the opinion of the whole court upon the question of law, whether, if such was the fact, the defendants, under the circumstances, were liable. Upon this question, supposing the accident to have occurred, and the loss to have been caused, by the negligence of the person employed to attend to and change the switch, in his not doing so in the particular case, the court are of the opinion that it is a loss for which the defendants are not liable, and that the action cannot be maintained.

Plaintiff nonsuit.[1]

CRISPIN v. BABBITT.

(81 N. Y. 516.—1880)

Appeal from judgment of the General Term of the Supreme Court, in the fourth judicial department, affirming a judgment in favor of plaintiff, entered upon a verdict, and affirming an order denying a motion for a new trial.

This action was brought to recover damages for injuries alleged to have been sustained by defendant's negligence.

At the time of the accident, plaintiff was working as a laborer in the iron works of the defendant, at Whitesboro, Oneida County. Plaintiff had assisted to draw a boat into a dry dock connected with

[1] *Cf.* Mexican Cent. Ry. Co. v. Knox, 114 Fed. 73, (1902), Per Curiam. An examination of the record, in connection with the very able and elaborate briefs of counsel, satisfies us that the pleadings and evidence in the case warranted the trial judge in charging the jury to the effect that, under the laws in force in the republic of Mexico at the time the defendant in error received his injuries, railway corporations were liable for all faults or accidents occurring through tardiness, negligence, imprudence, or want of capacity of their employees and this although the injury resulting was to another employee of the company, himself without fault; or, in other words, in the Republic of Mexico the employee of a railway corporation does not assume, as one of the risks of his employment, the negligence of a co-employee.

the works; after the boat was in the dry dock, it became necessary to pump out the water; this was done by means of a pump, worked by an engine. While plaintiff, with others, was engaged in lifting the fly wheel of the engine off its center, one John L. Babbitt carelessly let the steam on and started the wheel, throwing the plaintiff on to the gearing wheels, and thus occasioning the injuries complained of. Defendant lived in the city of New York, coming about once a month, for a day or two, to the iron works, of which, as the evidence tended to show, said Babbitt had general charge; being at one time the general superintendent and manager, at another time styled "business and financial man." The substance of the evidence, as to the position occupied by Babbitt, and the particulars of the accident, are fully set forth in the dissenting opinion of EARL, J. The defendant's counsel requested the court to charge, among other things, as follows:

"13th. That although John L. Babbitt may, as financial agent or superintendent, or overseer or manager, have represented defendant and stood in his place, he did so only in respect of those duties which the defendant had confided to him as such agent, superintendent, overseer or manager."

The court so charged.

"14th. That as to any other acts or duties performed by him in or about the defendant's works at Whitesboro, or in or about the defendant's business at said works, he is not to be regarded as defendant's representative, standing in his place, but as an employee or servant of the defendant, and as a fellow-servant of the plaintiff.

The court refused so to charge, saying: "I will leave that as a question of fact for the jury."

"17th. That if John L. Babbitt did let on the steam while plaintiff was engaged at the wheel, he was not, in so doing, acting in the defendant's place, but his act in so doing was his own act, and not the act of the defendant."

The court refused so to charge, leaving this also for the jury.

To the refusals to charge, defendant's counsel duly excepted.

RAPALLO, J. The liability of a master to his servant for injuries sustained while in his employ, by the wrongful or negligent act of another employee of the same master, does not depend upon the doctrine of *respondeat superior*.

If the employee whose negligence causes the injury is a fellow-

servant of the one injured, the doctrine does not apply. Conway v. Belfast Etc., Ry. Co., 11 Irish C. L. 353.

A servant assumes all risk of injuries incident to and occurring in the course of his employment, except such as are the result of the act of the master himself, or of a breach by the master of some term, either express or implied, of the contract of service, or of the duty of the master to his servant, viz.: to employ competent fellow-servants, safe machinery, etc. But for the mere negligence of one employee, the master is not responsible to another engaged in the same general service.

The liability of the master does not depend upon the grade or rank of the employee whose negligence causes the injury. A superintendent of a factory, although having power to employ men, or represent the master in other respects, is, in the management of the machinery, a fellow-servant of the other operatives. Albro v. Agawam Canal Co., 6 Cush. 75; Conway v. Belfast Ry. Co., supra; Wood's Master and Servant, § 438. See, also, §§ 431, 436, 437. On the same principle, however low the grade or rank of the employee, the master is liable for injuries caused by him to another servant, if they result from the omission of some duty of the master, which he has confided to some inferior employee. On this principle the Flike Case (53 N. Y. 549) was decided. CHURCH, Ch. J., says, at page 553: "The true rule, I apprehend, is to hold the corporation liable for negligence in respect to such acts and duties as it is required to perform as master, without regard to the rank or title of the agent intrusted with their performance. As to such acts the agent occupies the place of the corporation, and the latter is liable for the manner in which they are performed."

The liability of the master is thus made to depend upon the character of the act in performance of which the injury arises, without regard to the rank of the employee performing it. If it is one pertaining to the duty the master owes to his servants, he is responsible to them for the manner of its performance. The converse of the proposition necessarily follows. If the act is one which pertains only to the duty of an operative, the employee performing it is a mere servant, and the master, although liable to strangers, is not liable to a fellow-servant, for its improper performance. Wood's Master and Servant, § 438. The citation which the court read to the jury from 21 Am. Rep. 2, does not conflict with, but sustains this proposition; it says: "Where the master places the entire charge of his

business in the hands of an agent, the neglect of the agent in supplying and maintaining the suitable instrumentalities for the work required is a breach of duty for which the master is liable." These were masters' duties. In so far as the case from which the citation is made goes beyond this, I cannot reconcile it with established principles. In England, by a late act of Parliament, the rules touching the point now under consideration have been modified in some respects, but in this State no such legislation has been had.

The point is sharply presented in the present case, by the 13th, 14th and 17th requests to charge. 13th. That although John L. Babbitt may, as financial agent or superintendent, overseer or manager, have represented defendant, and stood in his place, he did so only in respect of those duties which the defendant had confided to him as such agent, superintendent, overseer or manager.

This the court charged.

14th. That as to any other acts or duties performed by him, in and about the defendant's works or business at said works, he is not to be regarded as defendant's representative, standing in his place, but as an employee or servant of the defendant, and a fellow-servant of the plaintiff.

This the court refused to charge, but left as a question of fact to the jury, and defendant's counsel excepted. I think this was a question of law, and that the court erred in submitting it to the jury, but should have charged as requested.

The court was further specifically requested to charge that in letting on the steam John L. Babbitt was not acting in defendant's place. This, I think, was a sound proposition, as applied to the present case. It was the act of a mere operative, for which the defendant would be liable to a stranger, but not to a fellow-servant of the negligent employee. As between a master and servant it was servant's, and not master's duty to operate the machinery.

The judgment should be reversed.

LAMB v. LITTMAN.

(131 N. C. 978; 44 S. E. 646.—1903)

DOUGLAS, J. Every legal question essential to the determination of this case was practically decided in the former opinion of this court, reported in 128 N. C. 361, 38 S. E. 911, 53 L. R. A. 852, which is the law of this case. * * * *

The second exception was to the charge of the court relating to the doctrine of fellow-servant as applied to Burrus. The effect of our former opinion upon substantially the same facts was to hold that Burrus was a vice principal. He was admittedly the superintendent or boss of the spinning room, where the plaintiff, a 10-year-old boy, was employed as a floor sweeper. The defendant contends that, as he did not have authority to hire and discharge hands, he could not be a vice principal. It is not absolutely necessary for a vice principal to have the authority to hire and discharge. In some exceptional cases the relation might exist without such power, but, in any event, the result is practically the same if it is understood that a disobedience of his orders will lead to a discharge. The mere form of requiring the boss to recommend a discharge, which will follow as a matter of course, does not change the legal effect, where there is no change in the practical result. The rule is thus stated in Turner v. Lumber Co., 119 N. C. 387, 26 S. E. 23: "The test of the question whether one in charge of other servants is to be regarded as a fellow servant or a middle-man is involved in the inquiry whether those who act under his orders have just reason for believing that the failure or refusal to obey the superior will or may be followed by a discharge from the service in which they are engaged;" citing Mason v. Railroad, 111 N. C. 482, 16 S. E. 698, 18 L. R. A. 845, 32 Am. St. Rep. 814, s. c., 114 N. C. 718, 19 S. E. 362; Shadd v. Railroad, 116 N. C. 970, 21 S. E. 554; Patton v. Railroad, 96 N. C. 455, 1 S. E. 863; Logan v. Railroad, 116 N. C. 940, 951, 21 S. E. 959. In this case it is also expressly held that "it is not essential that it should always appear that such authority is expressly given." If the discharge followed as a matter of course, its formal method would make but little difference to the employee. The efficacy of the principle lies in the coercive power existing, where a subordinate depends directly or indi-

rectly upon the will of another for his daily bread. These principles are expressly recognized by the entire court in Ward v. O'Dell, 126 N. C. 946, 36 S. E. 194, the division of opinion being entirely upon another point. See, also, Bailey's Master's Liability, 341; McKinney, Fellow Serv't, § 14. * * * *

Judgment affirmed.[1]

[1] In Pagels v. Meyer 193 Ill. 172, 61 N. E. 1111, (1901), the following request to charge was held to state the Illinois rule correctly: "The court instructs the jury that, in order to constitute servants of the same master fellow servants, it is essential that they shall be at the time of the injury directly cooperating with each other in the particular business in hand, or that their duties shall bring them into habitual association, so that they may exercise an influence upon each other promotive of proper caution; and if the jury believe from the evidence that the plaintiff, Meyer, and the man, Hermann Vogt, who was assisting him at the time of his alleged injury, were in the employ of the defendant, George Pagels, and that they were directly cooperating with each other in the particular business in hand, or that their usual duties brought them into habitual association so that they might exercise an influence upon each other promotive of proper caution, then the court instructs the jury, as a matter of law, that the said plaintiff and the said Vogt, who was thus assisting him at the time of his alleged injuries, were fellow servants; and if the jury further believe from the evidence that the injury received by the plaintiff was occasioned by his own carelessness and negligence, or through the carelessness or negligence of the said Vogt, who was thus assisting him at the time and place mentioned in the declaration, then the defendant would not be liable to the plaintiff, if he was otherwise without fault, and the jury should find the defendant not guilty."

In Edmonson v. Ken. Cen. Ry. 105 Ry. 479, 49 S. W. 200, (1899), the rule of that state is expressed as follows: "And it is equally well established that when a number of persons contract to perform service for another, the employees not being superior or subordinate the one to the other in its performance, and one receives an injury by the neglect of another in the discharge of this duty, they are regarded as substantially the agents of each other, and no recovery can be had against the employer. This doctrine that, where two servants are in the same field of labor, and the same grade of employment, the one not superior or subordinate to the other, neither can recover from the master for an injury caused by the neglect of his fellow servant, applies as well to an action under the statute for willful neglect as to a common-law action for neglect."

CHICAGO & A. R. CO. v. WISE.

(206 Ill. 453; 69 N. E. 500.—1903)

SCOTT, J. * * * We cannot hold as a matter of law that the two were fellow-servants. It is apparent from the testimony of Graves that he would not have turned east and attempted to cross the tracks of appellant if the west gate had been down. It follows, then, that the injury resulted from the negligence of Rubens, the towerman, which is the negligence of appellant, and the negligence of the engineer and fireman operating the engine, who were the fellow-servants of the injured man. But for the negligence of Rubens the negligence of the fellow-servants would not have been sufficient to cause the accident. The negligence of appellant and the negligence of the fellow-servants coincide to cause the accident, and together were the proximate cause thereof.

Where the negligence of the master is combined with the negligence of a fellow-servant in producing the injury, and the negligence of neither is alone the efficient cause, both the master and the fellow-servant are liable, and the injured servant may maintain his action against either or both together. 12 Am. & Eng. Ency. of Law (2d Ed.) p. 905; Pullman Palace Car Co. v. Laack, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215; Chicago & Northwestern Railway Co. v. Gillison, 173 Ill. 264, 50 N. E. 657, 64 Am. St. Rep. 117.[1]

JOHNSON v. LINDSAY.

(1891.—Appeal Cases, 871.)

Action for damages in respect of personal injury caused by the negligence of defendant's workmen. Defense that plaintiff was a fellow-servant with such workmen.

Plaintiff was engaged and paid by Higgs & Hill who were con-

[1] In Carter v. J. H. Lockey Piano Co., 177 Mass. 91, 58 N. E. 476 (1900), the court held that, if the master was negligent, in supplying a loose belt, such negligence was the remote cause of plaintiff's injury; the proximate and efficient cause being a fellow servant's negligence, in not using the stopping cable or the clamp, to prevent the elevator from moving.

tractors for building a block of dwellings, and at the time of the injury was clearing away rubbish pursuant to their orders. Defendants' workmen were engaged and paid by them, and neither they nor their workmen received nor were bound to receive directions from Higgs & Hill, nor submit to their control. They had no contract with Higgs & Hill, but contracted directly with the owner for their work, which consisted of fire-proof flats and floors of concrete for laundry purposes in said dwellings, to be completed with "Lindsay" system. Their workmen were raising buckets of concrete to the topmost story, in performance of this contract, when through the negligence of such workmen a bucket fell upon and injured the plaintiff.

At the trial the jury found a verdict for £52, 10s. which was set aside by the Queen's Bench Division on the ground that plaintiff and defendant's workmen were engaged in a common employment, and this judgment was affirmed by the Court of Appeal. (23 Q. B. D. 508.)

LORD HERSCHELL. The only other facts necessary to be stated are that there were, as far as appears, no communications between Higgs & Hill and Lindsay & Co. before the latter commenced their work, and that it was the architect who advised them that the buildings were sufficiently advanced to enable them to commence the work for which they had given him an estimate. It should be added that the payments were made to Lindsay & Co. through Higgs & Hill, and that at the time when the accident happened the appellant was not engaged about the work included in Lindsay & Co.'s contract. Upon this state of facts it is, I think, clear that the appellant was in no sense the servant of Lindsay & Co. It follows, therefore, that if it is essential to the defense of common employment that the person suing should himself be the servant of the master by whose servants' negligence the injury has been caused, the defense cannot be sustained in the present case. And upon a review of the authorities, I am unable to entertain any doubt that this is essential. Lord CRANWORTH, in delivering his opinion in this house, in the case of the Bartonshill Coal Company v. Reid, 3 Macq. 266, 295, thus states the rule established in this country: "When several workmen engage to serve a master in a common work, they know or ought to know the risks to which they are exposing themselves, including the risks of carelessness, against which their employer

cannot secure them, and they must be supposed to contract with reference to such risks." The law is laid down in substantially the same terms by Lord BLACKBURN in Howells v. Landore Steel Company, Law Rep. 10 Q. B. 62, and Lord Chief Justice ERLE in Hall v. Johnson, 3 H. & C., at p. 595, who, in delivering the judgment of the Exchequer Chamber, said: "The case falls within the principle established, not only in this country but also in Scotland, Ireland, and America, that a servant when he engages to serve a master undertakes as between himself and his master to run all the ordinary risks of the service including negligence on the part of a fellow-servant, when he is acting in the discharge of his duty as a servant of him who is the common master of both." And in the recent case of Swainson v. North Eastern Railway Company, 3 Ex. D., at pp. 348, 349, Lord BRAMWELL said: "We must consider what obligation a servant takes upon himself; it is sometimes said that he contracts to take upon himself the risks of his service; but the proposition may also be stated as follows, namely, that he has not stipulated for a right of action against his master if he sustains damages from the negligence of a fellow-servant. The two forms of the proposition seem to me substantially the same; in either case it is necessary to prove that a relation has been established between the person who complains and the master of the person who does the injury." The present master of the rolls in the same case thus expressed himself: "I think that the authorities bear out the proposition laid down in the Exchequer Division, that in order to give rise to the exemption there must be a common employment and a common master. It is not necessary that there should be a common service for a definite time or at fixed wages, for the exemption exists in the case of volunteers and of other persons, where plainly there has been no contract for payment. A volunteer puts himself under the control of another person and in respect of that other person he is for the time being in the position of a servant."

These authorities are sufficient to establish the proposition that unless the person sought to be rendered liable for the negligence of his servant can show that the person so seeking to make him liable was himself in his service, the defense of common employment is not open to him. Such service need not, of course, be permanent or for any defined term. The general servant of A may for a time or on a particular occasion be the servant of B, and a person who is not under any paid contract of service may nevertheless have

put himself under the control of an employer to act in the capacity of servant, so as to be regarded as such. This, as has been pointed out, is the position of a volunteer. But it is obvious that if the exemption results as it does according to the authorities I have cited, from the injured person having undertaken, as between himself and the person he serves, to bear the risks of his fellow-servant's negligence, it can never be applicable when there is no relation between the parties from which such an undertaking can be implied. There are other considerations which point in the same direction. It must be remembered that whilst a servant contracts with his master to bear the risks of the negligence of his fellow-servants, there is, as has been more than once laid down, a corresponding duty on the part of the employer to take due care to select competent servants. And it would be most unreasonable to hold that he is exempt from liability for his servants' negligence in any case where he is not under this obligation. But I do not see how such an obligation can arise otherwise than from some contractual relation. The obligation and the exemption appear to me to be correlative and to be implied from the relation of master and servant created between the parties. The language used by Lord CAIRNS in Wilson v. Merry, Law Rep. 1 H. L. Sc. 326, 331, 332, was much pressed upon your Lordships. It appears to have been supposed to countenance a wider exemption than is to be deduced from the other authorities to which I have referred. Lord CAIRNS, in delivering his opinion in the House, said: "I would only add to this statement of the law, that I do not think the liability or non-liability of the master to his workmen can depend upon the question whether the author of the accident is not, or is, in any technical sense the fellow workman or collaborateur of the sufferer. In the majority of cases in which accidents have occurred the negligence has no doubt been the negligence of a fellow workman; but the case of the fellow workman appears to me to be an example of the rule, and not the rule itself. The rule, as I think, must stand on higher and broader grounds." But it is clear to my mind that when Lord CAIRNS used this language he was only intending to repudiate the contention put forward by the appellant in that case, that the rule applied exclusively to workmen of the same grade actually employed in a common labor, and had no application where the person whose negligence was complained of was in the position of a manager not taking part in manual labor, who was in fact the employer's *alter ego*. Other passages in the noble and learned

Lord's opinion indicate, I think clearly, that he did not intend to state the law differently from Lord CRANWORTH, whose opinion in the Bartonshill Coal Company v. Reid, 3 Macq. 266, he quotes with approval.

It is said however that the case of Wiggett v. Fox, 11 Ex. 832, is decisive in favor of the respondents, and this view was adopted in the courts below. With deference to the learned judges who have entertained this view, I am quite unable to concur in it. If the law there laid down would determine the present case in favor of the respondents, I should feel bound to reject it as inconsistent with all the other English authorities. The plaintiff in Wiggett v. Fox, 11 Ex. 832, was administratrix of a servant of a sub-contractor who had been employed by the defendants to do a part of the work included in their contract. It was held that he was a fellow servant of the servant of the defendants whose negligence caused him injury; that the sub-contractor and his servants had become the servants of the contractor. The ground of this decision was explained by Baron CHANNELL in Abraham v. Reynolds, 5 H. & N. 143, 150, to be that it was proved that the deceased was paid by the defendants and that the defendants had control over and power to dismiss the deceased, though engaged by the sub-contractor. It is unnecessary to consider whether the view of the facts was correct, though the propriety of the decision has been more than once doubted, and notably by Lord Chief Justice COCKBURN in Rourke v. White Moss Colliery Company, 2 C. P. D. 205, 208; for a decision resting on such a view of the facts can, as it seems to me, have no application to the present case. In the first place, I do not think that Lindsay & Co., were sub-contractors under Higgs & Hill, I think they had an independent contract with those who were employing Higgs & Hill. In the second place even if they are to be regarded as in some sense sub-contractors under Higgs & Hill, I think it is impossible to say that the servants of Higgs & Hill, were the servants of Lindsay & Co., or that they had put themselves under the control of Lindsay & Co., to act as their servants, or were in any way acting as such at the time of the accident. It only remains for me to notice the recent Scotch decision in the case of Woodhead v. Gartness Mineral Company, 4 Sc. Sess. Cas., 4th series, 469, which was naturally much relied on by the respondents. Lord Justice LOPES stated in the court below, I think quite correctly, that the decision carried the principle of common employment much further

than was warranted by any of the English authorities. And it appears to me to be a development of the doctrine which is really in antagonism with cases which have been decided in this country. It eliminates altogether the element that the injured man and the man doing the injury must be in the employ of a common master, and treats as unimportant that which I consider to be of the essence of the exemption, that is to say, the mutual undertaking between the employer and employed to be implied from the relationship of master and servant constituted between them. I think the judgment appealed from ought to be reversed and the judgment entered for the plaintiff restored, and I so move your Lordships.

BOSWORTH v. ROGERS.

(82 Fed. 975.—1897)

JENKINS, Circuit Judge. The test of fellow service is a common master and a common service. These must concur. There must be unity of service and control. This principle underlies every ruling upon the subject from the time of Priestley v. Fowler, 3 Mees. & W. 1, and Murray v. Railroad Co., 1 McMull, 384, the pioneer cases upon the subject, and Farwell v. Railroad Corp., 4 Metc. (Mass.) 49 (in which Chief Justice SHAW delivered his masterly exposition of the doctrine of master and servant), down to the latest recorded decision. * * * *

In the case in hand there was no common master. The intestate of the defendant in error was in the service of the St. Louis Company. The servants through whose fault the jury found the collision to have occurred were in the service of the plaintiff in error, the receiver of the Chicago Company. The deceased was engaged in the operation of one of the trains of the former company. They who were neglectful and whose neglect caused the death were engaged in the operation of the trains of the receiver of the Chicago Company. There was no common master. The receiver was not bound in duty to Rogers by any obligations of a master, because Rogers was not in his service. It is not correct to say that because the trains of both companies, by agreement between them, were operated over a joint track, under and according to rules and regulations from

time to time established by the Chicago Company, therefore the servants of the St. Louis Company in the operation of its trains over the joint track were in the service of the Chicago Company. They were neither operating the trains of the latter company, nor, in any just sense, engaged in its service. It or its receiver had no control over them. It is true the trains were to be operated in accordance with the rules and regulations established by the Chicago Company. That was indispensable to the operation of a joint track; but, in so operating the trains, the servants of the one company did not become the servants of the other company; the trains of the one company did not become the trains of the other company; the servants of one company did not, for the time being, transfer their allegiance to the other company. They were bound, it is true, to operate the trains according to certain rules and regulations to which their master had agreed; but, in so doing, they discharged their duty to their own master, and not a duty owing by them to the other company. Neither company had control over the servants of the other company. Neither could discharge the servants of the other, and the right of discharge is a sure test of control. It is true that the companies had agreed that, for just cause, either party, under demand of the other, would discharge any of its servants employed in reference to the joint use of the track; but each for itself had to determine the cause, and whether it would comply with the demand. The stipulation gave no right to one company to discharge the servant of the other, and gave no control whatever over him. He owed service to his own master, and to no other, and could not be controlled or discharged by any other. Nor were these men engaged in a common service. The one set was operating the train of one company; the other set, the train of another company. The service was distinct; none the less so because the two trains, at the time of the injury, were upon the same track. They were engaged in the like service, but not in the same service. They were not working to a common end. They were serving separate masters, and in distinct employments. These views, as we think, are abundantly sanctioned by authority. Warburton v. Railway Co., L. R. 2 Exch. 30; Railroad Co. v. Stoermer, 1 U. S. App. 276, 2 C. C. A. 360, and 51 Fed. 518; Railroad Co. v. Craft's Adm'x, 29 U. S. App. 687, 16 C. C. A. 175, and 69 Fed. 124; Sawyer v. Railroad Co., 27 Vt. 370; Robertson v. Railroad Co., 160 Mass. 191, 35 N. E. 775; Zeigler v. Railroad Co., 52 Conn. 543; Smith v. Railroad Co., 19 N. Y. 127;

Svenson v. Steamship Co., 57 N. Y. 108; Railroad Co. v. Hardy, 57 N. J. Law 505, 31 Atl. 281, affirmed in court of errors, 58 N. J. Law, 505, 35 Atl. 1130; Railroad Co. v. Armstrong, 49 Pa. St. 186; Philadelphia, W. & B. R. Co. v. State, 58 Md. 372; Railroad Co. v. O'Connor, 119 Ill. 586, 9 N. E. 263; Phillips v. Railway Co., 64 Wis. 475, 25 N. W. 544.

There is a class of cases, of which Rourke v. Colliery Co., 46 Law J. C. P. 283, 1 C. P. Div. 556, Johnson v. City of Boston, 118 Mass. 114, and Ewan v. Lippincott, 47 N. J. Law, 192, are examples, to the effect that one may be in general the servant of one person, but for a special purpose, on a particular occasion, may make himself the servant of another; as where the servant of one is lent, for the time being, to another, to perform some service for that other, remaining, however, under pay from the former. In such case it is held by these decisions that, while performing such service, he is a fellow-servant with those in the service of the one for whom he is at the time working, although he be under pay from another. We need not here question the correctness of these decisions, since, as we conceive, they are not pertinent to the case in hand; for, as we have said, Rogers was in no just sense working under employment by, or in the service of, or for the purposes of, the plaintiff in error. The Ewan Case is referred to in the subsequent case of Hardy, in the same court, and is stated to have gone to the extreme, and is not to be considered as infringing upon the general doctrine stated; the Johnson Case was not deemed by the supreme judicial court of Massachusetts in the Robertson Case to impair the general rule; and the Rourke Case was also distinguished upon its facts from the Warburton Case. The Case of Clark v. Railroad Co., 92 Ill. 43, does not sustain the contention of the plaintiff in error. That was an action by Clark against his master to recover for injuries sustained through the negligence of the servant of another railroad company, and it was held that the master was not guilty of negligence. We are of opinion that the court rightly ruled that Rogers was not a fellow-servant of the train crew in the service of the plaintiff in error. * * * *

The overruling of the motion for a new trial cannot be assigned for error.

The judgment will be affirmed.

THE PETREL.

(Law Reports, Probate Division, 320.—1893.)

THE President (SIR FRANCIS H. JEUNE). On January 5, 1893, the Petrel came into collision with the Cormorant and the Cormorant was sunk. The owners of both vessels are the General Steam Navigation Company. It is admitted that the collision was caused by the negligence of those navigating the Petrel, and it is proposed to pay into court the sum for which the owners of the Petrel are liable. The first question is whether the master, officers and crew of the Cormorant can claim against this fund in respect to their effects lost in that vessel. It is said that they cannot, by reason of their common employment with the master, officers, and crew of the Petrel.

No doubt the captain and crew of the Cormorant had a common master with the captain and crew of the Petrel; but were they in common employment with each other? It is remarkable that although propositions of law defining common employment and recognizing its limitations have more than once been laid down, and have been illustrated by instances in which common employment has been held to exist, there appears to be no decided case in the English courts (there are several in the Scotch courts) in which upon consideration of the tests of it, common employment has been negatived. The general principles of the law of common employment were fully laid down in the first case on the subject, Priestly v. Fowler, 3 M. & W. 1, in 1837. But I think that the most complete exposition of what constitutes common employment is to be found in the great judgment of SHAW, C. J., of Massachusetts, in Farwell v. Boston Railroad Corporation, 4 Metcalf, 49, quoted at length in 3 Macq. H. L. C. 316, which, no doubt, materially influenced the House of Lords in the case of Bartonshill Coal Co. v. Reid, 3 Macq. H. L. C. 266, in which, reversing the decision of the Court of Session, their Lordships held that a miner laboring in a mine was in common employment with the engine-driver by whom the cage was worked. Two phrases of SHAW, C. J., indicate his view of the test of common employment. One lays down that he who engages in the employment of another for the performance of specified services "takes upon himself the natural risks and perils incident to the performance of such services," and the other refers to the condition of the safety of each servant depending much on the care and skill

with which each shall perform his appropriate duty. This view was adopted by BLACKBURN, J., in a judgment affirmed by the Exchequer Chamber (Morgan v. Vale of Neath Ry. Co., 5 B. & S. 570, at p. 580; Law Rep. 1 Q. B. 149) in these words: "I quite agree that it is necessary that the employment must be common in this sense, that the safety of the one servant must in the ordinary and natural course of things depend on the care and skill of the others. This includes almost if not every case in which the servants are employed to do joint work, but I do not think it is limited to such cases. There are many cases where the immediate object on which the one servant is employed is very dissimilar from that on which the other is employed, and yet the risk of injury from the negligence of the one Is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks, which are to be considered in his wages." On this principle, it having been previously decided in Hutchinson v. York, etc., Ry. Co., 5 Ex. 343, that the engine-driver of a train and a servant of the company carried in the train were in common employment, it was held that a carpenter repairing a turntable was in common employment with shunters working traffic in connection with it. The view of SHAW, C. J., appears again to have been followed in Lovell v. Howell, 1 C. P. D. 161, in which the principle approved was that the servant accepts the ordinary risk incident to his service. The principle of safety being dependent "in the ordinary and natural course of things" on the skill and care of the fellow-servant, and of "risk of injury being a natural and necessary consequence" of his want of skill or care, is consistent with, though perhaps more exact than, the test suggested by Lord CHELMSFORD in the case of the Bartonshill Coal Co. v. McGuire, 3 Macq. H. L. C. 300, at p. 307, from the negative point of view, that common employment does not exist when injury happens to the servant "on occasions foreign to his employment," or to servants engaged "in different departments of duty."

It was suggested in argument before me with reference to the case of Charles v. Taylor, 3 C. P. D. 492, that the physical contiguity of the employments constitutes a test. But, as SHAW, C. J., points out, this does not afford a distinction on which a practical rule can be established. In all cases the immediate instrument of physical injury must be contiguous to the person injured. And in most cases the person who causes physical injury is not far from the person to whom it results. But I suppose that the signalman at one end of

a rifle range is clearly in common employment with the marker at the other, when the two have a common master; and, to give a stronger instance, a servant who unskillfully packs dynamite in a factory, and another who in unpacking it at a distant warehouse is injured by its explosion, are clearly in common employment. On the other hand, mere contiguity, if unusual or accidental, would not be consistent with common employment. I doubt, also, if "one common object"—the phrase emphasized by BRAMWELL, B. in Waller v. South Eastern Ry. Co., 2 H. & C. 102, at p. 112, supplies an exact criterion. As BLACKBURN, J., points out, there may be common employment, though the immediate object of the labor of the two servants be very different, and if the common object be remote, such as that of making money for the employer (the sole nexus of employment suggested as existing between the two captains in this case), there may be no common employment. If a person carried on the occupation of a banker and brewer in different localities, and his bill clerk was run over by his drayman, it would be strange to say that the two were servants in common employment. I think, therefore, that probably no more complete definition can be formulated than is afforded by the language of BLACKBURN, J. The consideration that the risk of injury to the one servant is a natural and necessary consequence of misconduct in the other implies that the skill and care of the one is of special importance to the other by reason of the relations between their services. Tried by this principle, can it be said that the safety of the captain of one ship of a company is in the ordinary and natural course of things, dependent on the skill and care of the captain of another ship of the same company, or that injury by the negligence of one is an ordinary risk of the service of the other? In some cases it might be perhaps; for example, it might if all the ships of the company were in the habit of meeting in the same dock and the safety of each thus became, in the ordinary course of things, dependent on the skill with which the other was navigated. But in regard to navigation on the high seas or in the estuary of the Thames, would a captain of one ship of the General Steam Navigation Company have more reason to be interested in the skill of a captain of another ship of the Co. than in that of the masters of the myriad other craft in whose vicinity he might happen to navigate? By no reasonable supposition can it be imagined that he would. I think therefore that these two captains were not in common employment.

MANN v. O'SULLIVAN.

(126 Cal. 61; 58 Pac. 375.—1899.)

GAROUTTE, J. This is an action to recover damages for personal injuries. The single question involved is, does the complaint state a cause of action? Defendant was the owner of a certain building, in which she operated and maintained an elevator. "Plaintiff was employed by said defendant to work for her in the capacity of a carpenter, and to perform the work of inclosing the elevator shaft in said premises within a glass frame." While working at this employment, "said defendant, through her servant, agent, and employee, one Emmet Carney, carelessly and negligently, and without any warning or notice * * * to plaintiff, and against his positive instructions not to operate the elevator herein mentioned at any time without notice to him, suddenly operated * * * said elevator * * * from the ground floor, where said elevator was standing, so that said elevator suddenly struck with great force the screening on which plaintiff was working as aforesaid, * * * and that by reason of the gross negligence and carelessness of said defendant in operating said elevator as aforesaid said plaintiff sustained the injuries * * * above mentioned."

The important matter presented by this appeal arises from the solution of the question as to whether or not the plaintiff and Carney, the man operating the elevator, were fellow-servants. In other words, these two men being employed by defendant, were they employed "in the same general business"? Section 1970, Civ. Code. It is impossible to declare a rule of law by which all cases presenting this interesting question may be weighed and tested. In that excellent work, the American and English Encyclopædia of Law (volume 7, p. 864), it is said, "In the note will be found every authority, it is believed, determining who are and who are not fellow servants, alphabetically arranged according to the various occupations or employments." Yet, after a careful perusal of that note, we still find the same mist surrounding the question, and the legal atmosphere in no degree clarified. The authorities are widely divergent, and the text writers appear to be unable to agree upon a satisfactory rule by which it may be determined who are fellow servants, or what servants are engaged in a common employment, or, as the

statute of this state has it, what servants are employed "in the same general business." Shearman & Redfield, in their work upon Negligence, declare the rule as favorably to the servant as it can be found in any standard work, and that rule is declared in section 236: "Under the generally prevailing rule, fellow servants are engaged in a common employment when each of them is occupied in service of such a kind that all the others, in the exercise of ordinary sagacity, ought to be able to foresee, when accepting their employment, that his negligence would probably expose them to injury." Testing this case by the foregoing rule, the conclusion is irresistible that plaintiff, who was employed to repair the elevator shaft, and Carney, the man who was employed to operate the elevator, were servants of defendant engaged in a common employment, or, as our statute has it, engaged "in the same general business." It was plain to the plaintiff when he began work in repairing the elevator shaft that the negligence of Carney would expose him to great danger. He recognized the fact that danger was present with him, for he instructed Carney not to raise the elevator without a notification to him, in order that he might first remove to a place of safety. The conclusion arrived at in many cases rests upon the principle that, the danger from the negligence of another employee being fairly apparent, it should be held that all other employees assume the risk incident to that danger; and this principle forms the foundation of the rule which we have quoted from Shearman & Redfield.

We will notice a few cases where the facts and principle invoked appear to be similar to those here presented. In Besel v. Railroad Co., 70 N. Y. 177, it is held that a car repairer working upon a car was in common employment with the men in charge of a train not connected with the car upon which the repairer was doing the work.

To the same effect is Corcoran v. Railroad Co., 126 N. Y. 673, 27 N. E. 1022, and Campbell v. Railroad Co. (Pa. Sup.) 2 Atl. 489. In Hasty v. Sears, 157 Mass. 123, 31 N. E. 759 a case identical in its facts with one before us, the court said: "The plaintiff and the elevator boy were both servants of the defendant at the time of the plaintiff's injury, and, as their employment was a common employment, the negligence of the boy in running the car down upon the plaintiff was an obvious risk which the plaintiff assumed, and for which the defendant is not answerable to him. The plaintiff and the boy were both working to secure the successful operation of the elevator,—the plaintiff in repairing it, and the boy in

operating the car; and they were forwarding a common enterprise for the benefit of the defendant, and were in a common employment." In Fagundes v. Railroad Co., 79 Cal. 97, 21 Pac. 437, it is held that a laborer working upon the railroad track is a fellow servant with a conductor and a track walker. In Livingston v. Packing Co., 103 Cal. 263, 37 Pac. 149, it is held that the mate of a vessel and a waiter at the table are engaged "in the same general business," in the sense of those words as used in section 1970 of the Civil Code. The court declared that the general business of the defendant was the carrying of freight and passengers upon its steamer; that in the conduct of that business a waiter was as necessary an employee as a mate, and both were essentially necessary for the profitable conduct of the business.

In the case at bar it may be said that the business of defendant was operating and maintaining an elevator. A boy or man to manipulate it was a necessity, and likewise an engineer to handle the engine and furnish the power, and likewise a man to repair the machine itself when out of order. These men, in their respective lines of vocation, were necessary to the operation of the machine, and were assisting in the same general business of operating and maintaining the machine. The man to repair the elevator when it was out of order was as necessary as the waiter to the ship, or the repairer to the car, or the laborer to the railroad track. The allegation of the plaintiff that he was employed by the defendant in the capacity of a carpenter to do certain work for her, and that at the time he received the injury complained of he was doing the work for which he was employed, "under the direction of the defendant," shows that he was not an independent contractor, and precludes him from invoking the principles declared in Bennett v. Truebody, 66 Cal. 510, 6 Pac. 329. The defendant would have been liable to a stranger for any injury sustained by reason of his negligence, upon the ground that he was the servant of the defendant. * * * *

For the foregoing reasons, the judgment is affirmed.

§ 5.—SERVANT'S TORT LIABILITY.

LOUGH v. JOHN DAVIS & CO.

(30 Wash. 204; 70 Pac. 791.—1902)

DUNBAR, J. This is an action against an agent, who was authorized to rent and repair the tenement house described in the complaint, for permitting the house to become unsafe for want of repairs, from which cause the plaintiff was injured. * * * It is the contention of the respondent that the law is well settled that for a misfeasance the agent is personally liable, but that he is never liable for a mere nonfeasance; and that the respondent being charged only with a nonfeasance or neglect to do its duty, and not with any misfeasance or act which it ought not to do, the complaint on its face shows that it is not liable, and that the demurrer was therefore properly sustained. This rule is announced by some of the law writers and many of the courts. One of the leading cases sustaining this doctrine is Delaney v. Rochereau, 34 La. Ann. 1123, 44 Am. Rep. 456, where it was held that under the doctrine of both the common and civil law agents are not liable to third persons for nonfeasance or mere omissions of duty, being responsible to such parties only for the actual commission of those positive wrongs for which they would be otherwise accountable in their individual capacity under obligations common to all men. In this case a balcony which needed repairs fell, fatally injuring the plaintiff; and, while the agent was not responsible for the injured party's being in the house at that particular time,—he having obtained entrance by means of a key obtained from some one else,—the case is discussed and the judgment based upon the doctrine above announced.

This is also the established doctrine in New York. The case of Carey v. Rochereau (C. C.), 16 Fed. 87, is a Louisiana case, and bases its decision on Delaney v. Rochereau, *supra*, without discussion. Labadie v. Hawley, 48 Am. Rep. 278, held, in accordance with the same rule, that an agent renting his principal's house with authority to construct a cooking range was not liable for injury to an adjoining proprietor, caused by the use of the range; citing Story, Ag. 309, and other authorities. In Feltus v. Swan, 62 Miss. 415, it was held that an agent in charge of a plantation was not liable to the owner of an adjoining plantation for damage resulting

from the malicious neglect and refusal of the agent to keep open a drain which it was his duty as such agent to keep open.

The announcement of this doctrine is accredited by many of the courts indorsing it to the opinion in Lane v. Cotton, 12 Mod. 472, but it was, as a matter of fact, announced only incidentally in that case in a dissenting opinion. The question of the responsibility of the agent could not have been before that court, for the action was against a postmaster for the loss of a letter which was taken from the mail by a clerk, and it was only the responsibility of the master, and not that of the servant or agent, which was under discussion. The reason assigned to sustain this rule is that the responsibility must arise from some express or implied obligations between the particular parties standing in privity of law or contract with each other. If this be true, it is difficult to see what difference there is in the obligation to their principal between the commission of an act by the agents which they are bound to their principal not to do and the omission of an act which they have obligated themselves to their principal to do. They certainly stand in privity of law or contract with their principal exactly as much in the one instance as in the other, for the obligation to do what ought to be done is no more strongly implied in the ordinary contract of agency than is the obligation not to do what ought not to be done. This reason for the rule not being tenable, and no other reason being obvious, the rule itself ought not to obtain; for jurisprudence does not concern itself with such attenuated refinements. It rests upon broad and comprehensive principles in its attempt to promote rights and redress wrongs. If it takes note of a distinction, such distinction will be a practical one, founded on a difference in principle, and not a distinction without a difference; and there can be no distinction in principle between the acts of a servant who puts in motion an agency which, in its wrongful operation, injures his neighbor, and the acts of a servant who, when he sees such agency in motion, and when it is his duty to control it, negligently refuses to do his duty, and suffers it to operate to the damage of another. There is certainly no difference in moral responsibility; there should be none in legal responsibility. Of course, if the omission of the act or the nonfeasance does not involve a nonperformance of duty, then the responsibility would not attach. If it does involve a nonperformance of duty to such an extent that the agent is liable to the principal for the damages ensuing from his neglect, there is no hardship

in compelling him to respond directly to the injured party. Such practice is less circuitous than that which necessitates first the suing of the master by the party injured, and then a suit by the master against the servant to recoup the damages. * * *

There is still another class of cases which hold what seems to us to be the correct doctrine, viz., that the obligation, whether for misfeasance or nonfeasance, does not rest in contract at all, but is a common-law obligation devolving upon every responsible person to so use that which he controls as not to injure another, whether he is in the operation of his own property as principal or in the operation of the property of another as agent. One of the leading cases maintaining this view is Baird v. Shipman, a case decided in 1890, and reported in 132 Ill. 16, 23 N. E. 384, 7 L. R. A. 128, 22 Am. St. Rep. 504. There it was held that an agent who has complete control of a house belonging to an absent principal, and who lets the house in a dangerous condition, promising to repair it, is responsible to the third person injured by an accident caused by want of such repair. There is nothing to distinguish this case from the case at bar excepting the promise to repair, and that does not seem to have been deemed by the court an important feature: but the case was decided upon the broad principle above announced. Said the court: "It is not his contract with the principal which exposes him to or protects him from liability to third persons, but his common-law obligation to so use that which he controls as not to injure another. That obligation is neither increased nor diminished by his entrance upon the duties of agency, nor can its breach be excused by the plea that his principal is chargeable. If the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts,"—citing approvingly Osborn v. Morgan, *supra.*

To the same effect is Mayer v. Building Co. (Ala.), 16 South. 620, 28 L. R. A. 433, 53 Am. St. Rep. 88. The court there, after noticing the doctrine that the agent can be held liable to third persons for misfeasance only, says: "It is difficult to apply the same principles which govern in matters of contract between an agent and third persons to the torts of an agent which inflict injury on third persons, whether they be of misfeasance or nonfeasance, or to give a sound reason why a person who, acting as principal,

would be individually liable to third persons for an omission of duty, becomes exempt from liability for the same omission of duty because he was acting as servant or agent. The tort is none the less a tort to the third person whether suffered from one acting as principal or agent, and his rights ought to be the same against the one whose neglect of duty has caused the injury." In that case Baird v. Shipman, *supra*, is cited approvingly, with the remark that the rule laid down in that case is the better rule. So, in Ellis v. McNaughton, 76 Mich. 237, 42 N. W. 1113, 15 Am. St. Rep. 308, it was held that an agent who had entire control of premises was liable for injuries resulting from the removal of a walk on the premises by one of his employees, contrary to his orders, if, after such removal, he knew of the dangerous condition of the premises, and allowed them to remain in that condition. It would seem that, if there is anything in definitions, this was a pure nonfeasance, and yet the court, in trying to harmonize the distinction with the general rule announced and above discussed, said, speaking of the agent's duty in relation to the work: " Every day it was permitted to remain, when the defendant had the entire control of it, and the authority, without question, to replace it, was a wrong and a misfeasance." It is also said that, irrespective of his principal, the agent was bound while doing the work to so use the premises, including the sidewalk, as not to injure others. Misfeasance, said the court, may involve the omission to do something which ought to be done,—as when an agent engaged in the performance of his undertaking omits to do something which it is his duty to do under the circumstances, as when he does not exercise that degree of care which due regard for the rights of others required. To the same effect, Campbell v. Sugar Co., 62 Me. 552, 16 Am. Rep. 503. In Lottman v. Barnett, 62 Mo. 159, it was held that one having the general charge and superintendence of the construction of a building was responsible for the killing of a workman caused by the falling of a wall, which resulted from the giving way of supports on which the wall rested under the working of a jackscrew, although the appliance was put to work under the immediate direction of another person, employed by the owner of the building, and while the architect was absent, where it appeared that the manager of the jackscrew was employed under the advice of the architect, and subject to his discretion, and that he knew and approved of the method adopted for effecting the raising. Whether the wall fell because the plan for raising it

was a bad one, or because the supports were inadequate, it was held that in either case the disaster was attributable to positive misfeasance or negligence in a work which the architect had undertaken, but in which he failed to exhibit the care and skill which the law imposed upon him. * * * Doubtless much of the mist and fog which have enveloped the decisions on this subject is due to confusing the omission of an act which one is not bound to perform with the imperfect performance of an act to which he is bound. In other words, whoever undertakes a duty, and is clothed with authority to perform that duty, is responsible to the party injured for negligent imperfection in the discharge of such duty, on the broad doctrine announced above that he is obligated in transacting business to so transact it that his neighbor shall not thereby be injured; but there is no liability for the nonperformance of a duty not assumed, or not independently controlled. But for neither the nonperformance nor malperformance of a positive duty can one escape responsibility, whether that duty is imposed by contract or by general obligation, for under any and all circumstances it is the essence of negligence to omit to do something which ought to be done. While some detached expressions of Mr. Wharton have been quoted in support of the distinction contended for by the respondent, that author puts the question at rest in his work on the Law of Negligence (2d Ed. § 535), where he says: "The mere fact that I am the agent, in doing the injurious act, of another, does not relieve me from liability to third persons for hurt this act inflicts on them. Judge STORY, indeed, tells us that for omissions of the agent the principal alone is liable, while for misfeasances the agent is also liable; but this distinction, as has been already shown, can no longer be sustained. The true doctrine is that when an agent is employed to work on a particular thing, and has surrendered the thing in question into the principal's hands, then the agent ceases to be liable to third persons for hurt received by them from such thing, though the hurt is remotely due to the agent's negligence; the reason being that the casual relation between the agent and the person hurt is broken by the interposition of the principal as a distinct center of legal responsibilities and duties. But wherever there is no such interruption of causal connection,—in other words, wherever the agent's negligence directly injures a stranger, the agent having liberty of action in respect to the injury,

—then such stranger can recover from the agent damages for the injury."

There is some contention in respondent's brief on the alleged barrenness of the allegations of the complaint, but we think the allegations were ample to show that the respondent was authorized to keep the building in repair; that it undertook that office or duty and was in complete control of the work. It is alleged that it was in absolute control and management, with full power, authority, and direction to repair, and to allege that it agreed to do so would only be to allege the agreement to do the duty which the law imposed upon it after it had assumed the control and management which is alleged.

Our conclusion is that the complaint states a cause of action against the respondent.

The judgment is therefore reversed, with instructions to the lower court to overrule the demurrer to the complaint.

COSTA v. YOACHIM.

(104 La. 170; 28 So. 982.—1900)

BREAUX, J. Defendant, Yoachim, seeks to have a judgment of the Court of Appeals reversed which condemns him to pay to plaintiff the sum of $230, with legal interest and costs. The defendant, it appears, was sued in the District Court by Costa for an amount which he (Costa) paid to M. A. Bassich, being the value of a mare. Prior to this suit, Costa had been sued by Bassich for the value of this mare, which was killed while the defendant, Yoachim, was driving Costa's wagon. In this suit, Bassich, alleging the carelessness and negligence of the driver, recovered judgment against the owner of the wagon thus negligently and heedlessly driven. This judgment was paid by Costa, who afterwards sued the relator, Yoachim, who was his driver at the time. * * * *

Defendant's (Yoachim's) most serious complaint is that the District Court and the Court of Appeals have given conclusive effect to the judgment rendered in Bassich against Costa (No. 51,006). There does not seem to be any question but that the whole complaint in the first suit (Bassich against Costa) was directed against Yoa-

chim's careless and negligent driving as having caused the accident. He was present during the trial, and was defendant's witness. He could not properly take the position in the subsequent suit that he was not notified of the first case of Bassich against Costa. He was virtually a party to the proceedings. He, as relates to the act of negligence, was really the only one concerned. He, in substance, admitted in the first, or Bassich, case that he alone was driving Costa's wagon at the time of the accident. The judgment of the court could have been based upon no other ground than that Costa was liable because of the negligence and carelessness of the driver. In the second suit he testified again, denying negligence on his part. But the fact remains that he had been found negligent, and, while the judgment in question was not conclusive evidence of negligence, it was evidence to which it was proper to give some weight. When a judgment rendered by a court of competent jurisdiction is not attacked as fraudulent, and no error is made to appear, it is binding on the employee who was notified, who was a witness, and whose negligence was the only cause of damage which was found against his employer, who was made to pay the amount. It devolved upon the employee. The *onus* was with him to show wherein the judgment was in any particular erroneous. This he has failed to do.

"Persons notified of the pending of a suit in which they are directly interested must exercise reasonable diligence in protecting their interests, and if, instead of doing so, they willfully shut their eyes to the means of knowledge which they know are at hand to enable them to act efficiently, they cannot subsequently be allowed to turn around, and evade the consequences which their own conduct and negligence have superinduced." Robbins v. Chicago City, 4 Wall. 674, 18 L. Ed. 427. "While the master is liable to third persons for injury arising from his servant's negligence within the scope of his employment, if the master is free from fault as to negligence in question he may have his remedy against his servant for damages to which he is thereby subjected, and the measure of damages, in such case, is the amount of the recovery against the master." 4 Term R. 389; 6 Man. & G. 165.

The applicant, Yoachim, for this writ, is bound by the judgment in question unless error is shown.

SCHUMPERT v. SOUTHERN RY. CO.

(65 S. C. 382; 43 S. E. 813.—1903)

JONES, J. The plaintiff brought this action to recover damages for personal injuries sustained by him in a head-end collision at Belton, S. C., February 18, 1901, between two trains of the defendant company, on one of which plaintiff was engineer and on the other the defendant Hutchison was engineer. The Circuit Court, after trial and verdict, rendered judgment against both defendants for $10,000, which is now sought to be reversed. * * * *

2. The exceptions to the refusal of the motion for nonsuit and some of the exceptions to the charge raise the question whether the master and servant are liable as joint tort feasors for the tort of the servant committed within the scope of his employment and while in the master's service. The complaint alleged that plaintiff's injury was the result of the "joint and concurrent willful misconduct, gross carelessness and negligence, and inattention to duty on the part of the said defendants." The evidence tended to show that the injury was occasioned by a collision between the train on which the defendant Hutchison was engineer and the train on which plaintiff was engineer, resulting from the negligence or misconduct of Hutchison in moving his engine and train from the Anderson Branch line upon the main line, without protection against the regular freight train on which plaintiff was engineer, which at the time of the collision was within its time, and due at any moment. A rule of the defendant company required that "engines working within these limits may use the main track, keeping out of the way of all regular trains, but they must not occupy the main track on the time of such regular trains, except under proper protection." There was some evidence tending to show, and the jury made special finding, that plaintiff was operating his engine and train with the care due under the circumstances, and that train No. 58, with Hutchison as engineer, was upon the main line without flagman, and without protection, in violation of the rule and the custom. Appellants do not dispute the proposition that the master is liable for the negligence of the servant within the scope of his employment, nor do they dispute that the servant is also liable for his own tort. The contention is that there is no joint liability unless the master

directs or is present, actively co-operating with the servant in the commission of the tort.

There is undoubtedly some authority for this view, as shown by the cases cited in appellants' brief, and by reference to the citations found in 15 Ency. Pl. & Pr. 560, 561, and the note in 28 L. R. A. 441, 442. The leading case for such view is Parsons v. Winchell, 5 Cush. 592, 52 Am. Dec. 745, wherein the court held that master and servant are not jointly liable for servant's negligence in the master's absence in so driving a team as to cause an injury to another. In the view of that court, "the act of a servant is not the act of the master, even in legal intendment or effect, unless the master previously directs or subsequently adopts it. In other cases he is liable for the acts of his servant, when liable at all, not as if the acts were done by himself, but because the law makes him answerable therefor." The principal reason assigned for this view is that, if master and servant were made jointly liable, the master could not call on the servant for contribution in case he should satisfy the execution. But as it appears in the note to the case cited in 52 Am. Dec. 748, the Massachusetts court, in Hewett v. Swift, 3 Allen, 425, held that a joint action in the nature of trespass would lie against a corporation and its servant for personal injury inflicted by the latter in discharging duties imposed by the corporation. Parsons v. Winchell was an action on the case, and Hewett v. Swift was in trespass under common-law pleadings, which made a distinction between the remedies for injuries with force and injuries without force. All such distinctions are abolished under the Code. With reference to the matter of contribution which is suggested as presenting a difficulty in the way of holding the master and servant jointly liable, Mr. Cooley, in his work on Torts, at pages 144, 145, after stating the general rule as to contribution between wrongdoers, says: "But there are some exceptions to the general rule, which rest upon reasons at least as forcible as those which support the rule itself. They are of cases where, although the law holds all the parties liable as wrongdoers to the injured party, yet as between themselves some of them may not be wrongdoers at all, and their equity to require the others to respond for all the damages may be complete. There are many such cases where the wrongs are unintentional, or where the party, by reason of some relation, is made chargeable with the conduct of others. A case in point is where a railroad company is made to pay damages for an injury

caused by the carelessness of one of its servants. Here the injured party may justly hold both the company and its servants to responsibility; but the actual wrong, so far as it is one in morals, is on the part of the servant alone, and the company is holden only through its obligation to be accountable for the action of those to whom it intrusts its business. As between the company and its servant, the latter alone is the wrongdoer, and in calling upon him for indemnity the company base no claim upon its own misfeasance or default, but upon that of the servant himself."

Furthermore, the reason assigned in the Massachusetts case that the act of the servant is not the act of the master, even in legal intendment or effect, unless the master directs or adopts it, is not consistent with the liability of the master for the acts of the servant, as held in this State. In Rucker v. Smoke, 37 S. C. 380, 16 S. E. 40, 34 Am. St. Rep. 758, the ground of the master's liability is thus stated: "When one person invests another with authority to act as his agent for a specified purpose, all of the acts done by the agent in pursuance or within the scope of his agency are and should be regarded as really the acts of the principal. If, therefore, the agent, in doing the act which he is deputed to do, does it in such a manner as would render him liable for exemplary damages, his principal is likewise liable, for the act is really done by him." By legal intendment and effect the act of a servant within the scope of his agency is the act of the master. In such case there is a legal identification of the master and servant. In the case of a railroad corporation, which owes important duties to the public or those affected by its operation, and which cannot act, except through agents, there is the strongest reason for holding that with respect to acts done in its service by the agents within the scope of their employment, the corporation is present acting through its agents. "*Qui facit per alium facit per se.*" The servant is liable because of his own misfeasance or wrongful act in breach of his duty to so use that which he controlled as not to injure another. The master is liable because he acts by his servant, and is, therefore, bound to see that no one suffers legal injury through the servant's wrongful act done in the master's service within the scope of the agency. Both are liable jointly, because from the relation of master and servant they are united or identified in the same tortious act resulting in the same injury.

Some of the cases, in discussing the liability of the servant to a

third person, make a distinction between nonfeasance and misfeasance of the servant, but all agree that the servant is liable for his acts of misfeasance. Inasmuch as the acts of the servant in this case were clearly misfeasance, no occasion arises here for noticing the distinction. Among the authorities that may be cited in support of the view that master and servant are jointly liable for the misfeasance of the servant acting within the scope of the agency are Cooley on Torts, 142, Wright v. Wilcox, 19 Wend. 343, 32 Am. Dec. 507, reaffirmed in Phelps v. Wait, 30 N. Y. 78; Greenberg v. Whitcomb Lumber Co., 90 Wis. 225, 63 N. W. 93, reported also in 48 Am. St. Rep. 911, and in 28 L. R. A. 439, where the cases pro and con are cited in the notes at page 441; Winston's Adm'r v. Illinois Central R. R. Co., 65 S. W. 13, 55 L. R. A. 603.[1]

[1] In Howe v. Nor. Pac. Ry. 30 Wash. 569, 70 Pac. 1100, 60 L. R. A. 999, (1902), the court said: "Without specially reviewing the cases on this subject, which are collated in Warax v. Railroad Co. (C. C.) 72 Fed. 637, in which the right to join the master and servant is denied, they are cited as sustaining the affirmative of the proposition: Wright v. Wilcox, 19 Wend. 343 32 Am. Dec. 507; Suydam v. Moore, 8 Barb. 358; Montfort v. Hughes, 3 E. D. Smith, 591; Phelps v. Wait, 30 N. Y. 78; Wright v. Compton, 53 Ind. 337; Greenberg v. Lumber Co. (Wis.) 63 N. W. 93, 28 L. R. A. 439, 48 Am. St. Rep. 911; Newman v. Fowler, 37 N. J. Law, 89. In support of the view that the master cannot be joined as defendant in an action against his servant for negligence, where the master is not personally concerned in the negligence either by his presence or express direction, the following are cited: Parsons v. Winchell, 5 Cush. 592, 52 Am. Dec. 745; Mulchey v. Society, 125 Mass. 487; Clark v. Fry, 8 Ohio St. 358, 72 Am. Dec. 590; Seelen v. Ryan, 2 Cin. R. 158; Campbell v. Sugar Co., 62 Me. 553, 16 Am. Rep. 503; Beuttel v. Railroad Co. (C. C.) 26 Fed. 50; Page v. Parker, 40 N. H. 47; Bailey v. Bussing, 37 Conn. 349. Other cases have been decided since with equally conflicting results. But without entering into a discussion or an analysis of these conflicting opinions, considering the fact that universal authority will hold responsible in independent actions both the master and the agent or servant whose tortious act is the cause of the injury, and the holding of this court that as to the liability of the servant or agent there is no distinction between cases of misfeasance and those of nonfeasance, and in further consideration of the reformed procedure which obtains in this state, we are inclined to hold with those cases which permit the rights of all parties to be determined in one action, thereby discountenancing and rendering unnecessary a multiplicity of suits, rather than to compel the plaintiff to pursue and exhaust his remedy against one actor, and then, if compensation cannot be realized for the damage sustained, to proceed against another. We think this view is more in harmony with the spirit of our Code and modern procedure generally. It is therefore held that no error was committed by the court in overruling the defendant's demurrer to the complaint."

CHAPTER V.

REMEDIES.

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§ 2.—SELF-HELP.

BLADES v. HIGGS.

(Reported, *Supra*, p. 117)

KIRBY v. FOSTER.

(Reported, *Supra*, p. 119)

LAMBERT v. ROBINSON.

(162 Mass. 34; 37 N. E. 753.—1894)

LATHROP, J. The declaration in this case is for breaking and entering the plaintiff's close; and it alleges, further, in the same count, an assault upon the plaintiff by striking him on the head a violent blow with a dangerous weapon, and also assaults upon the plaintiff's wife and daughter. The answer is a general denial, and an amended answer alleges, if the defendants "did assault in the manner alleged by the plaintiff, that said assault was justified by the acts of the plaintiff." * * * *

We are met at the outset with the question, what is the rule of law applicable to the conduct of a person who has a right to enter upon the land of another? The plaintiff contends that the defendants had no right to use personal violence when resisted; that they could not enforce their rights by a breach of the peace; and that, upon being resisted, they should have desisted, and resorted to legal remedies. The defendants, on the other hand, contend that, having a right to enter and remove the furniture, they were entitled to use such force as was necessary, and that they are only liable in case

they used excessive force. The plaintiff's views are in accordance with a *dictum* of Mr. Justice WILDE in Sampson v. Henry, 11 Pick. 379, and with the remarks of Mr. Justice MORTON in Churchill v. Hulbert, 110 Mass. 42, and with a *dictum* of Mr Justice AMES in Drury v. Hervey, 126 Mass. 519, which follow and rely upon the *dictum* in Sampson v. Henry. This *dictum*, however, was held not to be a correct statement of the law, after full consideration, in Low v. Elwell, 121 Mass. 309; and that case must be considered as settling the law in this commonwealth that a person who has a right to enter upon the land of another, and there do an act, may use what force is required for the purpose, without being liable to an action. If he commits a breach of the peace, he is liable to the commonwealth. If he uses excessive force, he is liable to a personal action for an assault. This case has been affirmed in Coughlin v. Gray, 131 Mass. 56; in Stone v. Lahey, 133 Mass. 426; and in Twombly v. Monroe, 136 Mass. 464.

The case of Com. v. Haley, 4 Allen, 318, cited by the plaintiff, was, as said by Chief Justice GRAY in Low v. Elwell, "upon indictment for forcible entry, and no opinion was required or expressed as to the landlord's liability to a civil action." The case of Churchill v. Hulbert, 110 Mass. 42, was one where, clearly, excessive force was used; and the remarks of Mr. Justice MORTON, in delivering the opinion of the court: "If it be assumed, therefore, that the defendant had an irrevocable license to enter the plaintiff's premises, yet, upon being resisted, it was his duty to desist from his attempts to enter, and resort to his legal remedies,"—are based upon the cases of Sampson v. Henry and Com. v. Haley, and are inconsistent with the subsequent cases. In Drury v. Hervey, 126 Mass. 519, which was an action of tort for an assault, the plaintiff had no contractual relations with the defendant. The tenant of two rooms in the house which the plaintiff occupied undertook to give the defendant a right to enter and take a chattel in case the tenant did not pay for it as agreed. The remarks of Mr. Justice AMES, in the beginning of the opinion, based upon Sampson v. Henry and Churchill v. Hulbert, that, as a general rule, a right to enter is not to be enforced at the expense of a breach of the peace, cannot, since the decision of Low v. Elwell, be considered as having any bearing where the right to enter is given by a person having entire control of the premises. Nor do we think that the court intended in any way to discredit the rule laid down in Low v. Elwell, for the reasoning of the court in

favor of the plaintiff on this branch of the case proceeds upon the ground that the plaintiff, in resisting the efforts of the defendant's servants to enter the house, had no reason to know or believe, other than their unsupported word, that the strangers who were seeking admission had any right whatever to go to the tenant's room to take away furniture in his absence; that it was reasonable for her to ask them to wait until he returned; and that, under such circumstances, she had a right to resist their entrance. We are of opinion, therefore, that the contention of the defendants presents a correct view of the law.

The remaining question is whether there was evidence of the use of excessive force on the part of the defendants' servants, proper to be submitted to the jury. We are of opinion that there was.

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§ 3. ACTION FOR DAMAGES. (A) NOMINAL DAMAGES.

TEXARKANA & FT. S. RY. CO. v. ANDERSON.

(67 Ark. 123; 53 S. W. 678.—1899)

BUNN, C. J. This is an action for personal damages, laid in the complaint at $2,500, and verdict and judgment for $500, from which the defendant railway company appeals. * * * Plaintiff testified that before reaching Mistletoe, plaintiff's destination, she notified the conductor that she desired to leave the train there, and demanded that he bring the train to a stop, which he at the time, with an oath, refused to do; that by reason of such refusal plaintiff was compelled to pass her destination and go on to Horatio, the terminus of defendant's road. * * * This subject is fully treated in Trigg v. Railway Co., 74 Mo. 147, where it is held (quoting from the syllabus) that: "A passenger on a railroad train, who is carried beyond her station by negligence of the company, but without any circumstances of aggravation, and without receiving any personal injury, may recover compensation for the inconvenience, loss of time, labor, and expense of traveling back, but not for anxiety and suspense of mind suffered in consequence of the delay, nor the effects upon her health, nor the danger to which she was exposed in consequence of the train being stopped at her station an insufficient length of time to enable her to get off."

In the case at bar there do not appear to have been any circumstances of aggravation such as are referred to in the foregoing extract; and, as to the evidence in support of the allegations of the complaint, all that is proper to say will be said on the last proposition we deem it necessary to consider at this time; that is, whether or not the damages were excessive. It is not claimed that there was any personal injury, and no proof is adduced showing the value of the time and labor lost and expense incurred, or of any inconvenience other than is ordinarily attendant,—a mere delay of two hours, without peculiar circumstances giving unusual importance to the delay. The testimony of plaintiff and her son, a grown young man who accompanied her on this excursion, at most shows that, in the conversation between her and the conductor, the latter spoke "short, like," that he was drunk, and that some of the people on the train were drinking and boisterous, some cursing, and one or more singing the popular songs of the day. None of this is claimed to have been directed at plaintiff, and all is denied or so explained by other witnesses as to amount to nothing as a basis of a damage claim. Further than this we deem it improper to comment on the evidence. Nominal damages are all that could be properly recovered under such a state of things, and, of course, the $500 assessed was excessive.

The judgment of the court is therefore reversed for want of evidence to sustain it, and the cause is remanded for a new trial.[1]

BLODGETT v. STONE.

(60 N. H. 167.—1880)

Case, for diverting the water of a natural stream from the plaintiff's aqueduct. The defendant offered a brief statement alleging that the plaintiff had previously filed a bill in equity for an injunction against the defendant, based substantially on the facts.

[1] In Gray v. Times Newspaper Co., 74 Minn. 452. 77 N. W. 204 (1898), the defendant claimed, in case of a libelous publication, that in any event the evidence showed that the plaintiff was entitled to recover only nominal damages; hence the order denying a new trial should not be reversed. But the court held, that whether he was entitled to any more than nominal damages was a question for the jury.

now stated in his declaration, upon which an application for a temporary injunction had been denied after a full hearing of the facts before one of the justices of the court, and the equity suit had been entered "neither party," after the defendant had filed an answer denying the equity of the bill. No replication was filed, and no decree was ever entered up. The brief statement was rejected, and the defendant excepted. The defendant requested the following instructions to the jury, which the court declined to give, and the defendant excepted: "If the jury find that what Stone did was done from malice, still he is not liable unless his act caused actual damages to the plaintiff, and then only for the actual damages caused to the plaintiff, and the verdict in that case would settle nothing as to the legal rights of the parties." Verdict for the plaintiff.

CLARK, J. The facts stated in the brief statement constituted no defense, and it was properly rejected. The proceedings in the bill in equity were immaterial. No decree was entered up. If the judge who heard the application for a temporary injunction denied it on the merits, it would not be a bar to a subsequent hearing on the bill, and it is no bar to this suit. The request for instructions, that the defendant was not liable unless his act caused actual damage to the plaintiff, was rightly refused. The plaintiff was entitled to a verdict for nominal damages upon proof of the infringement of his right, although no actual injury was shown. Tillotson v. Smith, 32 N. H. 90; Bassett v. Company, 28 N. H. 438; Woodman v. Tufts, 9 N. H. 88; Munroe v. Stickney, 48 Me. 462; Chaffee v. Pease, 10 Allen, 537; Stowell v. Lincoln, 11 Gray, 434.

Judgment on the verdict.

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§ 3B. COMPENSATORY DAMAGES.

RICHARDS v. SANDFORD.

(2 E. D. Smith, 349: New York Common Pleas.—1854.)

WOODRUFF, J. An appeal is made from an order of special term denying the plaintiff's motion for a new trial, and we are urged to reverse that order upon two grounds; first, because irrelevant and

inadmissible testimony was given on the part of the defendant; and secondly, because the damages are grossly inadequate to the injury sustained by the plaintiff, through the culpable negligence of the defendant. * * * *

But upon the second ground, I think a new trial should be ordered. The action is brought to recover damages sustained by the plaintiff, in falling over stones left upon the sidewalk in a dark night, in front of the defendant's premises, by which one of his teeth was broken out, and his face otherwise cut and bruised. Under a charge from the court, to which there was no exception, and which, though not contained in the case as settled, we must assume to have been correct, the jury have found that this injury was sustained by the culpable negligence of the defendant, without fault on the part of the plaintiff, and I think they were warranted by the evidence in so finding. And for this injury the jury award to the plaintiff ten dollars damages only.

I fully agree that the general rule is, that in actions for torts, in which the rule of damages is not fixed by any definite ascertained rule, a new trial is not to be granted because the court think the damages either too great or too small. But this general rule is clearly open to exception, alike applying to excessiveness and inadequacy of damages. In the language of the court, in Collins v. The Albany and Schenectady Railroad Company, " Where the damages found by the jury are either so large or so small as to force upon the mind of every man, familiar with the circumstances of the case, the conviction, that by some means the jury have acted under the influence of a perverted judgment, it is the duty of the court, in the exercise of a sound judicial discretion, to grant a new trial."

Such, in my judgment, is the character of the present verdict. It cannot be reconciled in any manner with an honest and intelligent purpose to give the plaintiff an indemnity for the injury received. It leaves the plaintiff to pay the costs of the litigation. The case did not call for exemplary damages, but a just indemnity was due to the plaintiff; and though there is no precise standard by which such indemnity can be measured, it seems to me a mockery of justice to call this verdict indemnity in any sense.

The case above referred to, from 12 Barb. 492, and the cases there collected, seem to me to present the true rule on this subject, and to call for our interposition.

On the other hand, I think the defendant should be permitted to

avoid a new trial, as in that case, and in Armytage v. Haley, 4 Q. B. R. 917, by consenting to a modification of the verdict. If, therefore, he thinks proper to consent that the verdict be raised to one hundred dollars, judgment should be ordered for the plaintiff for that sum, and costs of suit, and a new trial be denied without costs of appeal. The order at special term should, I think, be modified in conformity with these views, and in default of such consent, a new trial should be ordered, on payment of costs.

Ordered accordingly.

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§ 3C.—EXEMPLARY DAMAGES.

MIL. &c. RY. CO. v. ARMS ET AL.

(91 U. S. 489.—1875.)

Error to the Circuit Court of the United States for the District of Iowa. This action against the railroad company to recover damages for injuries received by Mrs. Arms, by reason of a collision of a train of cars with another train, resulted in a verdict and judgment for $4,000. The company sued out this writ of error.

The bill of exceptions disclosed this state of facts: Mrs. Arms, in October, 1870, was a passenger on defendant's train of cars, which, while running at a speed of fourteen or fifteen miles an hour, collided with another train moving in an opposite direction on the same track. The jar occasioned by the collision was light, and more of a push than a shock. The fronts of the two engines were demolished, and a new engine removed the train. This was all the testimony offered by either party as to the character of the collision, and the cause of it; but there was evidence tending to show that Mrs. Arms was thrown from her seat, and sustained the injuries of which she complained. After the evidence had been submitted to the jury, the court gave them the following instruction: "If you find that the accident was caused by the gross negligence [1] of the

[1] Chesapeake & O. Ry. Co. v. Judd's Adm'x., 106 Ky, 364, 50 S. W. 539 (1899), Instruction No. 7 reads as follows: "Gross negligence," as used in these instructions, is the absence of ordinary care." It seems to us that this instruction would probably lead the jury to believe that they might find punitive damages in a case of mere ordinary negligence. We are not inclined

defendant's servants controlling the train, you may give to the plaintiff punitive or exemplary damages."

Mr. Justice DAVIS. The court doubtless assumed, in its instructions to the jury, that the mere collision of two railroad trains is, *ipso facto*, evidence of gross negligence on the part of the employees of the company, justifying the assessment of exemplary damages; for a collision could not well occur under less aggravated circumstances, or cause slighter injury. Neither train was thrown from the track, and the effect of the collision was only to demolish the fronts of the two locomotives. It did not even produce the "shock" which usually results from a serious collision. The train on which Mrs. Arms was riding was moving at a very moderate rate of speed; and the other train must have been nearly, if not quite, stationary. There was nothing, therefore, save the fact that a collision happened, upon which to charge negligence upon the company. This was enough to entitle Mrs. Arms to full compensatory damages; but the inquiry is, whether the jury had a right to go farther, and give exemplary damages.

It is undoubtedly true that the allowance of anything more than an adequate pecuniary indemnity for a wrong suffered is a great departure from the principle on which damages in civil suits are awarded. But although, as a general rule, the plaintiff recovers merely such indemnity, yet the doctrine is too well settled now to be shaken, that exemplary damages may in certain cases be assessed. As the question of intention is always material in an action of tort, and as the circumstances which characterize the transaction are, therefore, proper to be weighed by the jury in fixing the compensation of the injured party, it may well be considered whether the doctrine of exemplary damages cannot be reconciled with the idea, that compensation alone is the true measure of redress.

But jurists have chosen to place this doctrine on the ground, not that the sufferer is to be recompensed, but that the offender is to be

to the opinion that, under the testimony in this case, ordinary negligence could or should be considered gross negligence; and inasmuch as the jury has separated its findings as to compensatory and punitive damages, and inasmuch as this case has been in court for many years, we are of opinion that the ends of justice will be subserved by reversing so much of the verdict and judgment as allows any punitive damages, but allowing the verdict and judgment to the extent of $13,500 to stand. The judgment appealed from is therefore reversed, and the case remanded, with directions to the court below to set aside the $5,000 verdict and judgment for punitive damages, and to render judgment only for $13,500, and for proceedings consistent herewith."

punished; and, although some text-writers and courts have questioned its soundness, it has been accepted as the general rule in England and in most of the States of this country. (1 Redf. on Railw. 576; Sedg. on Measure of Dam. 4th ed. ch. 18 and note, where the cases are collected and reviewed.) It has also received the sanction of this court. Discussed and recognized in Day v. Woodworth, 13 How. 371, it was more accurately stated in The Philadelphia, Wilmington & Baltimore R. R. Company v. Quigley, 21 How. 213. One of the errors assigned was that the Circuit Court did not place any limit on the power of the jury to give exemplary damages, if in their opinion they were called for. Mr. Justice CAMPBELL, who delivered the opinion of the court, said:

"In Day v. Woodworth, this court recognized the power of the jury in certain actions of tort to assess against the tort-feasor punitive or exemplary damages. Whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person. But the malice spoken of in this rule is not merely the doing of an unlawful or injurious act: the word implies that the wrong complained of was conceived in the spirit of mischief or criminal indifference to civil obligations."

As nothing of this kind, under the evidence, could be imputed to the defendants the judgment was reversed.

Although this rule was announced in an action for libel, it is equally applicable to suits for personal injuries received through the negligence of others. Redress commensurate to such injuries should be afforded. In ascertaining its extent the jury may consider all the facts which relate to the wrongful act of the defendant, and its consequences to the plaintiff; but they are not at liberty to go farther unless it was done willfully or was the result of that reckless indifference to the rights of others, which is equivalent to an intentional violation of them. In that case the jury are authorized, for the sake of public example, to give such additional damages as the circumstances require. The tort is aggravated by the evil motive, and on this rests the rule of exemplary damages.

* * * * *

For this reason the judgment is reversed and a new trial ordered.

LEXINGTON RY. CO. v. COZINE.

(64 S. W. (Ky.) 848.—1901.)

BURNAM, J. This action was instituted by plaintiff against the defendant to recover damages for a malicious assault made upon him by one of the defendant's employees in the course of his employment. It is alleged by plaintiff that he was a passenger on one of defendant's cars, and had paid the usual fare; that the defendant's conductor in charge of the car, without provocation, wantonly and maliciously assaulted, beat, and bruised him.

* * * * *

It is contended by appellant that, as the reply failed to deny the averment of the answer that the assault by the defendant's conductor "was made without their knowledge or assent," the court erred in the third instruction, in allowing the jury to impose punitive or exemplary damages because of the malice of their conductor; in other words, that the court, under the pleadings and facts of the case, erred in submitting to the jury the question of punitive damages at all. There is perhaps no question of law in which there has been greater diversity of opinion by courts of last resort than whether a corporation is liable for exemplary damages for the unauthorized malicious acts of its agents or servants, committed in the course of their employment.

The doctrine of the federal courts upon this question, as settled by recent decisions of the Supreme Court of the United States, is: "First, that a corporation is not liable to exemplary damages except where a natural person would be liable to such damages for a similar act done by his agent or servant; second, that a natural person is not generally liable for such damages except where he has commanded the doing of the oppressive act, or subsequently ratified it." See Railroad Co. v. Prentice, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97.[1] The opinion, however, concedes that corporations may be liable

[1] In this case, the law of punitive damage is exhaustively discussed, Mr. Justice Gray, writing for the court, said: "The single question presented for our decision, therefore, is whether a railroad corporation can be charged with punitive or exemplary damages for the illegal, wanton, and oppressive conduct of a conductor of one of its trains towards a passenger. * * * In this court the doctrine is well settled that in actions of tort the jury, in addition to the sum awarded by way of compensation for the plaintiff's injury, may

to exemplary damages for the act of an agent within the scope of his employment, provided the criminal intent necessary to warrant the imposition of such damages is brought home to the corporation. And this rule of the federal courts is in accord with the principle announced by a number of State courts in passing upon the question.

But, on the other hand, a great majority of the American State courts hold that a corporation is liable in exemplary damages for the willful, malicious, oppressive, insulting, or fraudulent act of its servant, although it had not precisely authorized or subsequently ratified it, if the act was committed by the servant in the course of his employment, and while acting within the scope of his authority. See Hutch. Carr. § 815a, and 5 Thomp. Corp. § 6338. In discuss-

award exemplary, punitive, or vindictive damages, sometimes called 'smart money,' if the defendant has acted wantonly or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations. But such guilty intention on the part of the defendant is required in order to charge him with exemplary or punitive damages. The Amiable Nancy, 3 Wheat. 546, 558, 559, 4 L. Ed. 456; Day v. Woodworth, 13 How. 363, 371, 14 L. Ed. 181; Railroad Co. v. Quigley, 21 How. 202, 213, 214, 16 L. Ed. 73; Railroad Co. v. Arms, 91 U. S. 489, 493, 495, 23 L. Ed. 374; Railroad Co. v. Humes, 115 U. S. 512, 521, 6 Sup. Ct. 110, 29 L. Ed. 463; Barry v. Edmunds, 116 U. S. 550, 562, 563, 6 Sup. Ct. 501, 29 L. Ed. 729; Railroad Co. v Harris, 122 U. S. 597, 609, 610, 7 Sup. Ct. 1286, 30 L. Ed. 1146; Railroad Co. v. Beckwith, 129 U. S. 26, 36, 9 Sup. Ct. 207, 32 L. Ed. 585. Exemplary or punitive damages, being awarded not by way of compensation to the sufferer, but by way of punishment to the offender, and as warning to others, can only be awarded against one who has participated in the offense.

A principal, therefore, though, of course, liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages merely by reason of wanton, oppressive, or malicious intent on the part of the agent. This is clearly shown by the judgment of this court in the case of The Amiable Nancy, 3 Wheat. 546, 4 L. Ed. 456. * * * No doubt a corporation, like a natural person, may be held liable in exemplary or punitive damages for the act of an agent within the scope of his employment, provided the criminal intent necessary to warrant the imposition of such damages is brought home to the corporation. Caldwell v. Steamboat Co., 47 N. Y. 282; Bell v. Railway Co., 10 C. B. (N. S.) 287; Id., 4 Law T. (N. S.) 293. Independently of this, in the case of a corporation, as of an individual, if any wantonness or mischief on the part of the agent, acting within the scope of his employment, causes additional injury to the plaintiff in body or mind, the principal is, of course, liable to make compensation for the whole injury suffered. Kennon v. Gilmer, 131 U. S. 22, 9 Sup. Ct. 696, 33 L. Ed. 110; Meagher v. Driscoll, 99 Mass. 281, 285, 96 Am. Dec. 759; Smith v. Holcomb, 99 Mass. 552; Hawes v. Knowles, 114 Mass. 518, 19 Am. Rep. 383; Campbell v. Palace Car Co. (C. C.) 42 Fed. 484."

ing this question, Mr. Wood, in his work on Railroads (section 317, p. 1417), says: "It was at one time regarded as improper to hold the principal liable for the willful or malicious acts of his agents, and consequently exemplary damages were not recoverable against a corporation for the act of its servants unless it was shown that it authorized or had ratified the act. But, since it is now almost universally held that the master is liable for the willful and even malicious acts of his servant in the line of his duty, the rule which is now generally held in the better class of cases, that exemplary damages may be given against a corporation for injuries inflicted by its servant willfully or maliciously, and whether authorized or ratified by it or not, seems to us to be consistent and just, especially when the action is for personal injuries received by a passenger to whom the company owes a contract duty, and in some of the States such damages are provided for by statute." The rule laid down by Sutherland is: "If a corporation like a railroad company is guilty of an act such as in the case of an individual would subject him to exemplary damages, they would be equally liable to such damages. And when the servants of the corporation engaged in the carriage of passengers are guilty of such acts or conduct in the performance of their duties, in the transportation of the injured party as a passenger, as would subject them to damages of this nature, the corporation is also liable to punitive damages, without proof that they directed or ratified such acts or conduct." See Suth. Dam. p. 271. Pierce, R. R. § 305, says: "Although compensation for the injury is the usual measure of damage, other damages in addition have been allowed where the author of the injury committed it maliciously, willfully, or even recklessly, or, according to some authorities, with gross carelessness. Such supplementary damages are called 'exemplary.'"

Time does not permit, nor is it needful, that we should undertake to cite the numerous cases in which this rule has been followed in other States. It is sufficient to say that it is too firmly grounded in the jurisprudence of this State to be now questioned. It has been emphatically approved in Railroad Co. v. Ballard, 85 Ky. 311, 3 S. W. 530, 7 Am. St. Rep. 600; Same v. Mitchell, 87 Ky. 327, 8 S. W. 706; Same v. Long, 94 Ky. 410, 22 S. W. 747,—and in numerous other cases. And while there is nothing in this record to show that appellants either authorized or approved the conduct of their conductor in this transaction, yet he was clearly acting in the

line of his employment at the time of his brutal and unjustifiable assault upon a passenger who was entitled to his care and protection, and the case is clearly brought within the rule of law which authorized the instruction complained of.

Judgment affirmed.

MORGAN v. BARNHILL.

(118 Fed. 24.—1902.)

SHELBY, Cir. J. * * * 2. It is assigned as error that the trial court instructed the jury to find a verdict against the defendant for exemplary damages. The contention is that exemplary damages are never a matter of right, but are always in the discretion of the jury. Many cases are cited as tending to sustain this view, but we need not comment on them, the question here being controlled by the constitution and statutes of Texas. Section 26 of article 16 of the constitution of 1876 is as follows:

"Every person, corporation, or company that may commit a homicide through any willful act or omission or gross neglect, shall be responsible in exemplary damages to the surviving husband, widow, heirs of his or her body, or such of them as there may be, without regard to any criminal proceeding that may or may not be had in relation to the homicide."

Articles 3017 to 3019 of the Revised Statutes of Texas are as follows:

"An action for actual damages on account of injuries causing the death of any person, may be brought in the following cases: * * * (2) When the death of any person is caused by the wrongful act or negligence, neglectfulness or default of another.

"Art. 3018. The wrongful act, negligence, carelessness, neglectfulness or default mentioned in the preceding article, must be of such character as would, if death had not ensued, have entitled the party injured to maintain an action for such injury.

"Art. 3019. When the death is caused by the willful act or omission, or gross negligence of the defendant, exemplary as well as actual damages may be recovered."

The express statutory law which authorizes this action provides that for a willful homicide the wrongdoer shall be responsible for "exemplary damages" as well as for "actual damages." If it be conceded that the plaintiff in error is right in his contention as to the general rule in the absence of an express statute, we think the

court below, in view of these statutes, properly declared the law. The evidence of the defendant himself showed that the killing was willful and wholly unjustifiable, and he is therefore liable for both actual and exemplary damages.

WOODEN WARE CO. v. UNITED STATES.

(106 U. S. 432.—1882.

Mr. Justice MILLER. This is a writ of error founded on a certificate of division of opinion between the judges of the Circuit Court.

The facts, as certified, out of which this difference of opinion arose, appear in an action in the nature of trover brought by the United States for the value of two hundred and forty-two cords of ash timber, or wood suitable for manufacturing purposes, cut and removed from that part of the public lands known as the reservation of the Oneida tribe of Indians in the State of Wisconsin. This timber was knowingly and wrongfully taken from the land by Indians and carried by them some distance to the town of Depere, and there sold to the E. E. Bolles Wooden Ware Company, the defendant, which was not chargeable with any intentional wrong or misconduct or bad faith in the purchase. The timber on the ground, after it was felled, was worth twenty-five cents per cord, or $60.71 for the whole, and at the town of Depere, where defendant bought and received it, $3,50 per cord, or $850 for the whole quantity. The question on which the judges divided was whether the liability of the defendant should be measured by the first or the last of these valuations. It was the opinion of the Circuit Judge that the latter was the proper rule of damages, and judgment was rendered against the defendant for that sum.

We cannot follow counsel for the plaintiff in error through the examination of all the cases, both in England and this country, which his commendable research has enabled him to place upon the brief. In the English courts the decisions have in the main grown out of coal taken from the mine, and in such cases the principle seems to be established in those courts, that when suit is brought for the value of the coal so taken, and it has been the result of an honest mistake as to the true ownership of the mine, and the

taking was not a willful trespass, the rule of damages is the value of the coal as it was in the mine before it was disturbed, and not its value when dug out and delivered at the mouth of the mine. Martin v. Porter, 5 Mee. & W. 351; Morgan v. Powell, 3 Ad. & E. (N. S.) 278; Wood v. Morewood, 3 id. 440; Hilton v. Woods, Law Rep. 4 Eq. 432; Jegon v. Vivian, Law Rep. 6 Ch. App. 742.

The doctrine of the English courts upon this subject is probably as well stated by Lord HATHERLEY in the House of Lords, in the case of Livingstone v. Rawyards Coal Co., 5 App. Cas. 25, as anywhere else. He said: "There is no doubt that if a man furtively, and in bad faith, robs his neighbor of his property, and because it is underground is probably for some little time not detected, the court of equity in this country will struggle, or I would rather say, will assert its authority to punish the fraud by fixing the person with the value of the whole of the property which he has so furtively taken, and making him no allowance in respect of what he has so done, as would have justly been made to him if the parties had been working by agreement." But "when once we arrive at the fact that an inadvertence has been the cause of the misfortune, then the simple course is to make every just allowance for outlay on the part of the person who has so acquired the property, and to give back to the owner, so far as is possible under the circumstances of the case, the full value of that which cannot be restored to him in specie."

There seems to us to be no doubt that in the case of a willful trespass, the rule as stated above is the law of damages both in England and in this country, though in some of the State courts the milder rule has been applied even in this class of cases. Such are some that are cited from Wisconsin. Weymouth v. Chicago & Northwestern Railway Co., 17 Wis. 550; Single v. Schneider, 24 id. 299.

On the other hand, the weight of authority in this country as well as in England favors the doctrine that where the trespass is the result of inadvertence or mistake, and the wrong was not intentional, the value of the property when first taken must govern; or if the conversion sued for was after value had been added to it by the work of the defendant, he should be credited with this addition. Winchester v. Craig, 33 Mich. 205, contains a full examination of the authorities on the point. Heard v. James, 49 Miss. 236; Baker v. Wheeler, 8 Wend. (N. Y.) 505; Baldwin v. Porter, 12 Conn.

484. While these principles are sufficient to enable us to fix a measure of damages in both classes of torts where the original trespasser is defendant, there remains a third class, where a purchaser from him is sued, as in this case, for the conversion of the property to his own use. In such case, if the first taker of the property were guilty of no willful wrong, the rule can in no case be more stringent against the defendant who purchased of him than against his vendor.

But the case before us is one where, by reason of the willful wrong of the party who committed the trespass, he was liable, under the rule we have supposed to be established, for the value of the timber at Depere the moment before he sold it, and the question to be decided is whether the defendant who purchased it then with no notice that the property belonged to the United States, and with no intention to do wrong, must respond by the same rule of damages as his vendor should if he had been sued. It seems to me that he must. The timber at all stages of the conversion was the property of plaintiff. Its purchase by defendant did not divest the title nor the right of possession. The recovery of any sum whatever is based upon that proposition. This right, at the moment preceding the purchase by defendant at Depere, was perfect, with no right in any one to set up a claim for work and labor bestowed on it by the wrongdoer. It is also plain that by purchase from the wrongdoer defendant did not acquire any better title to the property than his vendor had. It is not a case where an innocent purchaser can defend himself under that plea. If it were, he would be liable to no damages at all, and no recovery could be had. On the contrary, it is a case to which the doctrine of *caveat emptor* applies, and hence the right of recovery in plaintiff.

On what ground, then, can it be maintained that the right to recover against him should not be just what it was against his vendor the moment before he interfered and acquired possession? If the case were one which concerned additional value placed upon the property by the work or labor of the defendant after he had purchased, the same right might be applied as in case of the inadvertent trespasser. But here he has added nothing to its value. He acquired possession of property of the United States at Depere, which, at that place, and in its then condition, is worth $850, and he wants to satisfy the claim of the government by the payment of $60. He founds his right to do this, not on the ground that any-

thing he has added to the property has increased its value by the amount of the difference between these two sums, but on the proposition that in purchasing the property he purchased of the wrongdoer a right to deduct what the labor of the latter had added to its value.

If, as in the case of an unintentional trespasser, such right existed, of course defendant would have bought it and stood in his shoes; but as in the present case, of an intentional trespasser, who had no such right to sell, the defendant could purchase none. Such is the distinction taken in the Roman law, as stated in the Institutes of Justinian, Lib. II. Tit. I. sec. 34. After speaking of the painting by one man on the tablet of another, and holding it to be absurd that the work of an Apelles or Parrhasius should go without compensation to the owner of a worthless tablet, if the painter had possession fairly, he says, as translated by Dr. Cooper: "But if he, or any other, shall have taken away the tablet feloniously, it is evident that the owner may prosecute by action of theft."

The case of Nesbitt v. St. Paul Lumber Co., 21 Minn. 491, is directly in point here. The Supreme Court of Minnesota says: "The defendant claims that because they (the logs) were enhanced in value by the labor of the original wrongdoer in cutting them, and the expense of transporting them to Anoka, the plaintiff is not entitled to recover the enhanced value; that is, that he is not entitled to recover the full value at the time and place of conversion." That was a case, like this, where the defendant was the innocent purchaser of the logs from the willful wrongdoer, and where, as in this case, the transportation of them to a market was the largest item in their value at the time of conversion by defendant; but the court overruled the proposition, and affirmed a judgment for the value at Anoka, the place of sale.

To establish any other principle in such a case as this would be very disastrous to the interest of the public in the immense forest lands of the government. It has long been a matter of complaint that the depredations on these lands are rapidly destroying the finest forests in the world. Unlike the individual owner, who, by fencing and vigilant attention, can protect his valuable trees, the government has no adequate defense against this great evil. Its liberality in allowing trees to be cut on its land for mining, agricultural and other specified uses has been used to screen the lawless depredator who destroys and sells for profit. To hold that when the

government finds its own property in hands but one remove from these willful trespassers, and asserts its right to such property by the slow processes of the law, the holder can set up a claim for the value which has been added to the property by the guilty party in the act of cutting down the trees and removing the timber, is to give encouragement and reward to the wrongdoer, by providing a safe market for what he has stolen and compensation for the labor he has been compelled to do to make his theft effectual and profitable.

We concur with the Circuit Judge in this case, and the judgment of the Circuit Court is affirmed.

WRIGHT v. BANK OF THE METROPOLIS.

(110 N. Y. 237.—1888.)

PECKHAM, J. This case comes before us in a somewhat peculiar condition. As both parties appeal from the same judgment, which is for a sum of money only, it would seem as if there ought not to be much difficulty in obtaining its reversal. It is obvious, however, that a mere reversal would do neither party any good, as the case would then go down for a new trial, leaving the important legal question in the case not passed upon by this court. This, we think, would be an injustice to both sides. The case is here, and the main question is in regard to the rule of damages, and we think it ought to be decided. By this charge the case was left to the jury to give the highest price the stock could have been sold for intermediate its conversion and the day of trial, provided the jury thought, under all the circumstances, that the action had been commenced within a reasonable time after the conversion, and had been prosecuted with reasonable diligence since. Authority for this rule is claimed under Romaine v. Van Allen, 26 N. Y. 309, and several other cases of a somewhat similar nature referred to therein. Markham v. Jaudon, 41 N. Y. 235, followed the rule laid down in Romaine v. Allen. In these two cases a recovery was permitted which gave the plaintiff the highest price of the stock between the conversion and the trial. In the Markham Case the plaintiff had not paid for the stocks, but was having them carried for him by his broker (the defendant) on a margin. Yet this fact was not regarded as making

any difference in the rule of damages, and the case was thought to be controlled by that of Romaine.

In this state of the rule the case of Matthews v. Coe, 49 N. Y. 57–62, came before the court. The precise question was not therein involved, but the court (per CHURCH, Ch. J.) took occasion to intimate that it was not entirely satisfied with the correctness of the rule in any case not special and exceptional in its circumstances, and the learned judge added that they did not regard the rule as so firmly settled by authority as to be beyond the reach of review whenever an occasion should render it necessary. One phase of the question again came before this court, and in proper form, in Baker v. Drake, 53 N. Y. 211, where the plaintiff had paid but a small percentage on the value of the stock, and his broker, the defendant, was carrying the same on a margin, and the plaintiff had recovered in the court below, as damages for the unauthorized sale of the stock, the highest price between the time of conversion and the time of trial. The rule was applied to substantially the same facts as in Markham v. Jaudon, *supra*, and that case was cited as authority for the decision of the court below. This court, however, reversed the judgment and disapproved the rule of damages which had been applied. The opinion was written by that very able and learned judge, RAPALLO, and all the cases pertaining to the subject were reviewed by him, and in such a masterly manner as to leave nothing further for us to do in that direction. We think the reasoning of the opinion calls for a reversal of the judgment. * * * *

The whole reasoning of the opinion is still based upon the question as to what damages would naturally be sustained by the plaintiff in restoring himself to the position he had been in; or, in other words, in repurchasing the stock. It is assumed in the opinion that the sale by the defendants was illegal and a conversion, and that plaintiff had a right to disaffirm the sale and require defendants to replace the stock. If they failed then the learned judge says the plaintiff's remedy was to do it himself, and to charge the defendants with the loss necessarily sustained by him in doing so. Is not this equally the duty of a plaintiff who owns the whole of the stock that has been wrongfully sold? I mean, of course, to exclude all question of punitive damages resting on bad faith. In the one case the plaintiff has a valid contract with the broker to hold the stock, and the broker violates it and sells the stock. The duty of the broker is to replace it at once upon the demand of the plaintiff. In case

he does not it is the duty of the plaintiff to repurchase it. Why should not the same duty rest upon a plaintiff who has paid in full for his stock and has deposited it with another conditionally? The broker who purchased it on a margin for the plaintiff violates his contract and his duty when he wrongfully sells the stock just as much as if the whole purchase price had been paid by the plaintiff. His duty is in each case to replace the stock upon demand, and in case he fails so to do, then the duty of the plaintiff springs up, and he should repurchase the stock himself. This duty, it seems to me, is founded upon the general duty which one owes to another, who converts his property under an honest mistake, to render the resulting damage as light as it may be reasonably within his power to do. It is well said by EARL, J., in Parsons v. Sutton, 66 N. Y. 92, that " the party who suffers from a breach of contract must so act as to make his damages as small as he reasonably can. He must not by inattention, want of care or inexcusable negligence, permit his damage to grow, and then charge it all to the other party. The law gives him all the redress he should have by indemnifying him for the damage which he necessarily sustains." (See, also, Dillon v. Anderson, 43 N. Y. 231; Hogle v. New York Central & Hudson River Railroad Company, 28 Hun, 363, the latter case being an action of tort.) In such a case as this, whether the action sounds in tort, or is based altogether upon contract, the rule of damages is the same. (Per DENIO, Ch. J., In Scott v. Rogers, 31 N. Y. 676; and Per RAPALLO, J., in Baker v. Drake, *supra.*) The rule of damages as laid down in Baker v. Drake, in cases where the stock was purchased by the broker on a margin for plaintiff, and where the matter was evidently a speculation, has been affirmed in the later cases in this court. Gruman v. Smith, 81 N. Y. 25; Colt v. Owens, 90 N. Y. 368. In both cases the duty of the plaintiff to repurchase the stock within a reasonable time is stated. I think the duty exists in the same degree where the plaintiff had paid in full for the stock and was the absolute owner thereof. * * * *

Now so far as the duty to repurchase the stock is concerned, I see no difference in the two cases. There is no material distinction in the fact of ownership of the whole stock which should place the plaintiff outside of any liability to repurchase after notice of sale, and should render the defendant continuously liable for any higher price to which the stock might rise after conversion and before trial. As the same liability on the part of defendant exists in each

case to replace the stock, and as he is technically a wrongdoer in both cases, but in one no more than in the other, he should respond in the same measure of damages in both cases, and that measure is the amount which, in the language of RAPALLO, J., is the natural, reasonable and proximate result of the wrongful act complained of, and which a proper degree of prudence on the part of the plaintiff would not have averted. The loss of a sale of the stock at the highest price down to trial, would seem to be a less natural and proximate result of the wrongful act of the defendant in selling it when plaintiff had the stock for an investment, than when he had it for a speculation, for the intent to keep it as an investment is at war with any intent to sell it at any price, even the highest. But in both cases the qualification attaches that the loss shall only be such as a proper degree of prudence on the part of the complainant would not have averted, and a proper degree of prudence on the part of the complainant consists in repurchasing the stock after notice of its sale, and within a reasonable time. If the stock then sells for less than the defendant sold it for, of course the complainant has not been injured, for the difference in the two prices inures to his benefit. If it sells for more, that difference the defendant should pay.

It is said that, as he had already paid for the stock once, it is unreasonable to ask the owner to go in the market and repurchase it. I do not see the force of this distinction. In the case of the stock held on margin, the plaintiff has paid his margin once to the broker, and so it may be said that it is unreasonable to ask him to pay it over again in the purchase of the stock. Neither statement, it seems to me, furnishes any reason for holding a defendant liable to the rule of damages stated in this record. The defendant's liability rests upon the ground that he has converted, though in good faith and under a mistake as to his rights, the property of the plaintiff. The defendant is, therefore, liable to respond in damages for the value. But the duty of the plaintiff to make the damages as light as he reasonably may, rests upon him in both cases, for there is no more legal wrong done by the defendant in selling the stock, which the plaintiff had fully paid for, than there is in selling the stock, which he has agreed to hold on a margin, and which agreement he violates by selling it. All that can be said is that there is a difference in amount, as in one case the plaintiff's margin has gone, while in the other the whole price of the stock has been sacrificed. But there

is no such difference in the legal nature of the two transactions as should leave the duty resting upon the plaintiff in the one case to repurchase the stock, and in the other case should wholly absolve him therefrom. A rule which requires a repurchase of the stock in a reasonable time, does away with all questions as to the highest price before the commencement of the suit, or whether it was commenced in a reasonable time or prosecuted with reasonable diligence, and leaves out of view any question as to the presumption that plaintiff would have kept his stock down to the time when it sold at the highest mark before the day of trial, and would then have sold it, even though he had owned it for an investment. Such a presumption is not only of quite a shadowy and vague nature, but is also, as it would seem, entirely inconsistent with the fact that he was holding the stock as an investment. If kept for an investment, it would have been kept down to the day of trial, and the price at that time there might be some degree of propriety in awarding, under certain circumstances, if it were higher than when it was converted. But to presume, in favor of an investor, that he would have held his stock during all of a period of possible depression, and would have realized upon it when it reached the highest figure, is to indulge in a presumption which, it is safe to say, would not be based on fact once in a hundred times. To formulate a legal liability based upon such presumption, I think is wholly unjust in such a case as the present. Justice and fair dealing are both more apt to be prompted by adhering to the rule which imposes the duty upon the plaintiff to make his loss as light as possible, notwithstanding the unauthorized act of the defendant, assuming of course, in all cases, that there was good faith on the part of the defendant.

It is the natural and proximate loss which the plaintiff is to be indemnified for, and that cannot be said to extend to the highest price before the trial, but only to the highest price reached within a reasonable time after the plaintiff has learned of the conversion of his stock within which he could go in the market and repurchase it. What is a reasonable time when the facts are undisputed and different inferences cannot reasonably be drawn from the same facts, is a question of law. Colt v. Owens, 90 N. Y. 368; Hedges v. H. R. Railroad Co., 49 id. 223.

We think that beyond all controversy in this case, and taking all the facts into consideration, this reasonable time had expired by July 1, 1878, following the ninth of May of the same year. The

highest price which the stock reached during that period was $2795, and as it is not certain on what day the plaintiff might have purchased, we think it fair to give him the highest price reached in that time. From this should be deducted the amount of the check and interest to the day when the stock was sold, as then it is presumed the defendant paid the check with the proceeds of the sale.

In all this discussion as to the rule of damages, we have assumed that the defendant acted in good faith, in an honest mistake as to its right to sell the stock, and that it was not a case for punitive damages. A careful perusal of the whole case leads us to this conclusion. It is not needful to state the evidence, but we cannot see any question in the case showing bad faith, or indeed any reason for its existence. The fact is uncontradicted that the defendant sold the stock upon what its officers supposed was the authority of the owner thereof given to them by Elliott. * * * *

Judgment reversed.[1]

SELLECK v. CITY OF JANESVILLE.

(100 Wis. 157; 75 N. W. 975.—1898.)

CASSODAY, C. J. * * * Error is assigned because the court charged the jury that: "The plaintiff is not held responsible for the errors or mistakes of a physician or surgeon in treating an injury received by a defect in the street or sidewalk, providing she exercised ordinary care in procuring the services of such physician. Where one is injured by the negligence of another, or by negligence of a town or city, if her damages have not been increased by her own subsequent want of ordinary care she will be entitled to recover in consequence of the wrong done, and the full extent of damage, although the physician that she employed omitted to employ the remedies most approved in similar cases, and by reason thereof the damage to the injured party was not diminished as much as it otherwise should have been." Such charge is certainly supported by authority as well as reason. Loesser v. Humphrey, 41 Ohio St. 378; Railway Co. v. Flavey, 104 Ind. 411, 424, 3 N. E. 389, and

[1] Followed in Gallagher v. Jones, 129 U. S. 193; 9 Sup. Ct. R. 335, 32 L. Ed. 658 (1888.)

4 N. E. 908; Reed v. City of Detroit, 65 N. W. 967, 108 Mich. 224; Car. Co. v. Bluhm, 109 Ill. 20; Rice v. City of Des Moines, 40 Iowa, 638; Stover v. Inhabitants of Blue Hill, 51 Me. 439; Tuttle v. Farmington, 58 N. H. 13; Boynton v. Somerworth, Id. 321; Lyons v. Railroad Co., 57 N. Y. 489; Bardwell v. Town of Jamaica, 15 Vt. 438. The wrongdoer may well anticipate that the person injured will employ a physician or surgeon, and in doing so will exercise ordinary care in making the selection; but, where that is done, such person cannot be expected to assume the responsibility of the very highest degree of skill. This court has gone so far as to hold that, "where personal injuries result proximately from negligence or other tort, the wrongdoer is liable for the damages actually sustained, although they are increased by a tendency to disease on the part of the person injured." McNamara v. Village of Clintonville, 62 Wis. 207, 22 N. W. 472.

GALVESTON, H. & S. A. RY. CO. v. ZANTZINGER.

(92 Tex. 365; 48 S. W. 563.—1898.)

GAINES, C. J. * * * 2. The second question presents a novel and difficult point, and one upon which we have found no direct authority. It must be resolved upon principle. When the negligence of the plaintiff concurs with that of the defendant, and contributes to produce the damage for which he sues, he cannot recover. It is not so if the act of the defendant be willful. In speaking of the rule of contributory negligence, the supreme court of Indiana say: "The doctrine, however, can have no application to the case of an intentional and unlawful assault and battery, for the reason that the person thus assaulted is under no obligation to exercise any care to avoid the same, by retreating or otherwise, and for the further reason that his want of care can in no just sense be said to contribute to the injury inflicted upon him by such assault and battery." Steinmetz v. Kelly, 72 Ind. 442. See, also, Ruter v. Foy, 46 Iowa, 132; Brownell v. Flagler, 5 Hill, 282. The principles announced apply to the question of the original right of action.

The question under consideration, however, involves rather an inquiry as to the duty of a party who has been injured by the fault

Begin with false imprisonment.

of another to use reasonable precautions to avoid the consequences of his injury. 1 Sedg. Dam. § 202. In negligence cases such duty is usually regarded as a part of the law of contributory negligence. The rule is that if a plaintiff, who has been injured by the negligent conduct of the defendant, fails to exercise reasonable care to avoid the consequences of his injury, he cannot recover for so much of his damage as results from that failure. But does this rule apply to the case of a willful injury? We are of opinion that it does not. Since one who has committed an assault and battery upon another cannot urge in his defense that the plaintiff might by the use of due care have avoided the battery, we think where the injury is intentional he should not be permitted to say, in reduction of the damages, that the plaintiff might have prevented them, at least in part, by careful conduct on his part. If negligence contributing to the injury cannot be set up to defeat the action when the act of the defendant was willful, by a parity of reasoning the defendant in such a case should not be permitted to say that, but for the negligence of the plaintiff in failing to avoid the consequences of the wrong, he would have suffered no damage, or only a part of the damages for which he claims a recovery.

We apprehend that a plaintiff cannot make a case by intentionally contributing to the injury which the defendant willfully intends to inflict upon him. For example, should one intentionally hurl a missile at another, with the intent to injure, and should the other voluntarily place himself in its way, and thereby receive a battery which he would otherwise have escaped, the person so struck could not recover. So, when he has been intentionally injured, he should not be permitted to recover damages which might have resulted from his willful omission to take reasonable precautions to avoid the consequences of the wrong. Since a negligent act of the plaintiff, contributing to a result brought about by the concurring negligent act of the defendant, exonerates the defendant from the consequences of his wrong,—*pro tanto,* at least,—so a willful act of the plaintiff should have a like effect in case of an intentional injury. Loker v. Damon, 17 Pick. 284. In the case cited Chief Justice SHAW says: "In assessing damages, the direct and immediate consequences of the injurious act are to be regarded, and not the remote, speculative, and contingent consequences, which the party injured might easily have avoided by his own act. Suppose a man should enter his neighbor's field unlawfully, and leave the gate open; if, before the owner

knows it, cattle enter and destroy the crop, the trespasser is responsible. But if the owner sees the gate open, and passes it frequently, and willfully and obstinately, or through gross negligence, leaves it open all summer, and cattle get in, it is his own folly. So, if one throw a stone and break a window, the cost of repairing the window is the ordinary measure of damage. But if the owner suffers the window to remain, without repairing, a great length of time after notice of the fact, and his furniture or pictures, or other valuable articles, sustain damage, or the rain beats in and rots the window, this damage would be too remote. We think the jury were rightly instructed that, as the trespass consisted in removing a few rods of fence, the proper measure of damage was the cost of repairing it, and not the loss of a subsequent year's crop, arising from the want of such fence. I do not means to say that other damages may not be given for injury in breaking the plaintiff's close, but I mean only to say that, in the actual circumstances of this case, the cost of replacing the fence, and not the loss of an ensuing year's crop, is to be taken as the rule of damages for that part of the injury which consisted in removing the fence and leaving the close exposed."

Where, in cases of an intentional tort, the plaintiff has purposely omitted to take reasonable steps to prevent an aggravation of his damages, or has been so grossly negligent in that regard as to be deemed guilty of a willful omission on his part, he ought not to recover for the damages which might have been prevented by proper care; but, on the other hand, we think that he should recover his full damages where he has been guilty of ordinary negligence only. A party cannot voluntarily inflict an injury upon another, and then claim that the party injured owes him the duty to exercise ordinary care to protect him from the consequences of his act.

We answer the second question by saying that, in our opinion, the trial court did not err in failing to submit the question of Campbell's contributory negligence in the charge set out in the statement.

§ 3D.—SPLITTING UP DAMAGES.

REILLY v. SICILIAN ASPHALT PAVING CO.

(170 N. Y. 40; 62 N. E. 772.—1902.)

CULLEN, J. The appellant claimed that while driving in Central Park, in the city of New York, both his person and his vehicle were injured in consequence of collision with a gravel heap placed on the road through the negligence of the defendant. Thereupon he brought an action against the defendant in the court of common pleas to recover damages for the injury to his person. Subsequently he brought another action in one of the district courts in the city of New York to recover for the injury to his vehicle. In this last action he obtained judgment, which was paid by the defendant. Thereafter the defendant set up by supplemental answer the judgment in the district court suit and its satisfaction as a bar to the further maintenance of the action in the common pleas. On the trial of the case in the supreme court, to which, under the constitution, the action was transferred, it was held that the plaintiff's right of action was merged in the judgment recovered in the district court, and his complaint was dismissed. The judgment entered upon this direction was affirmed by the Appellate Division and an appeal has been taken to this court by allowance.

The rule is that a single or entire cause of action cannot be subdivided into several claims, and separate actions maintained thereon. Secor v. Sturgis, 16 N. Y. 548; Nathans v. Hope, 77 N. Y. 420. As to this principle there is no dispute. Therefore the question presented by this appeal is whether, from the defendant's negligence, and the injury occasioned thereby to the plaintiff in his person and his property, there arose a single cause of action, or two causes of action,—one for the injury to his person, and the other for injury to his property. The question is not determined by the Code of Civil Procedure, for, though in section 484 it prescribes what separate causes of action may be joined in the same complaint, it nowhere assumes to define what is a single cause of action. Nor is there any controlling decision of this court on the point. In Mulligan v. Ice Co. (affirmed without opinion) 109 N. Y. 657, 16 N. E. 684, the question discussed in the opinion of the learned court below

and necessarily involved in the decision of this court, was the effect of a release which the plaintiff asserted was intended to cover only the injuries to his property, but was fraudulently prepared so as to embrace his whole cause of action. The case is doubtless authority for the proposition that a voluntary settlement between the parties of part of a claim does not satisfy or discharge the whole claim. But the principle that the parties may, by voluntary agreement, sever or split up a single cause of action, though a plaintiff cannot of his own volition do the same, seems to be generally recognized even in those jurisdictions where the rule is held most firmly that a single tort gives rise but to a single cause of action. O'Beirne v. Lloyd, 43 N. Y. 248; Bliss v. Railroad Co., 160 Mass. 447, 36 N. E. 65, 39 Am. St. Rep. 504.

The question now before us has been the subject of conflicting decisions in different jurisdictions. In England it has been held by the court of appeal (Lord COLERIDGE, C. J., dissenting) that damages to the person and to property, though occasioned by the same wrongful act, give rise to different causes of action (Brunsden v. Humphrey, 14 Q. B. Div. 141), while in Massachusetts, Minnesota, and Missouri the contrary doctrine has been declared, Doran v. Cohen, 147 Mass. 342, 17 N. E. 647; King v. Railroad Co. 80, Minn. 83, 82 N. W. 1113, 50 L. R. A. 161, 81 Am. St. Rep. 238; Von Fragstein v. Windler, 2 Mo. App. 598. The argument of those courts which maintain that an injury to person and property creates but a single cause of action is that, as the defendant's wrongful act was single, the cause of action must be single, and that the different injuries occasioned by it are merely items of damage proceeding from the same wrong, while that of the English court is that the negligent act of the defendant in itself constitutes no cause of action, and becomes an actionable wrong only out of the damage which it causes. "One wrong was done as soon as the plaintiff's enjoyment of his property was substantially interfered with. A further wrong arose as soon as the driving also caused injury to the plaintiff's person." Brunsden v. Humphrey, *supra.*

I doubt whether either argument is conclusive. If, where one person was driving the vehicle of another, both the driver and the vehicle were injured, there can be no doubt that two causes of action would arise—one in favor of the person injured, and the other in favor of the owner of the injured property. On the other hand, if both the horse and the vehicle, being the property of the

same person, were injured, there would be but a single cause of action for the damage to both. If, while injury to the horse and vehicle of a person gives rise to but a single cause of action, injury to the vehicle and its owner gives rise to two causes of action, it must be because there is an essential difference between an injury to the person and an injury to property, that makes it impracticable, or at least very inconvenient, in the administration of justice, to blend the two. We think there is such a distinction. Different periods of limitation apply. The plaintiff's action for personal injuries is barred by the lapse of three years; that to the property not till the lapse of six years. The plaintiff cannot assign his right of action for the injury to his person, and it would abate and be lost by his death before a recovery of a verdict, and, if the defendant were a natural person, also by his death before that time. On the other hand, the right of action for injury to property is assignable, and would survive the death of either party. It may be seized by creditors on a bill in equity, Hudson v. Plets, 11 Paige, 180, and would pass to an assignee in bankruptcy.

Possibly the difficulties arising from the difference in the periods of limitation and the difference in the rule of survival between a personal injury and a property injury might be obviated in practice by holding the statute a bar to that portion of the damages, a claim for which would have been outlawed had it been a separate cause of action, and by permitting, in case of death, the action to be revived so far as it relates to property. We do not see, however, how it would be practicable to deal with a case where the right of action for injury to the property had passed to an assignee in bankruptcy, or to a receiver on a creditors' bill without treating it as an independent cause of action. Though, as we have already said, section 484 of the Code does not expressly determine the point in issue, still it is not without much force in the argument that the two injuries constitute separate causes of action. Under the old Code of Procedure, at the time of its original enactment injuries to person and injuries to property were separately classified as causes of action, and it was not permitted to join those of one class with those of another. Code Proc. § 167. By an amendment in 1852, injuries to persons and property were put in the same class. But by section 484 of the Code of Civil Procedure they are again placed in distinct classes, and cannot be united. If the plaintiff's cause of action is single, into what class does it fall? Is it for an injury to the person, which may

be united with other causes of action for personal injuries, or is it for injury to property, which may be enjoined with claims of the same nature, or is it *sui generis,* a nondescript which must stand alone?

While some of the difficulties in the joinder of a claim for injury to the person and one for injury to the property in one cause of actions are created by our statutory enactments, the history of the common law shows that the distinction between torts to the person and torts to property has always obtained. Lord Justice BOWEN, in the Brunsden Case, has pointed out that there is no authority in the books for the proposition that a recovery for trespass to the person is a bar to an action for trespass to goods, or *vice versa.* It is true that at common law the necessity of bringing two suits could, at the election of the plaintiff, be obviated in some cases, as, for instance, by declaring for trespass on the plaintiff's close, and alleging in aggravation thereof an assault upon his person. See Wat. Tresp. 205, 406. Still in such a case there would be but a single cause of action, to wit, the trespass upon the close, and, if the defendant justified this trespass, it would be a complete defense to the action; the personal assault being merely a matter of aggravation. Carpenter v. Barber, 44 Vt. 441. Therefore, for reason of the great difference between the rules of law applicable to injuries of the person and those relating to injuries to property, we conclude that an injury to person and one to property, though resulting from the same tortious act, constitute different causes of action.

The judgment appealed from should be reversed, and a new trial granted; costs to abide the event.

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§ 4.—LOCALITY OF TORT ACTIONS.

ELLENWOOD v. MARIETTA CHAIR CO.

(158 U. S. 105; 15 Sup. Ct. 771.—1895.)

Mr. Justice GRAY. This action was brought in the circuit court of the United States for the Southern district of Ohio by one Walton, administrator of the estate of Latimer Bailey, deceased, and a citizen of New Jersey, against the Marietta Chair company, a corporation of Ohio. * * * *

Various grounds taken by the defendant in error in support of the judgment below need not be considered, because there is one decisive reason against the maintenance of the action.

By the law of England, and of those states of the Union whose jurisprudence is based upon the common law, an action for trespass upon land, like an action to recover the title or the possession of the land itself, is a local action, and can only be brought within the state in which the land lies. Livingston v. Jefferson, 1 Brock. 203, Fed. Cas. No. 8,411; McKenna v. Fisk, 1 How. 241, 247; Northern I. R. Co. v. Michigan Cent. R. Co., 15 How. 233, 242, 251; Huntington v. Attrill, 146 U. S. 657, 669, 670, 13 Sup. Ct. 224; British South Africa Co. v. Companhia De Moçambique [1893] App. Cas. 602; Cragin v. Lovell, 88 N. Y. 258; Allin v. Lumber Co., 150 Mass. 560, 23 N. E. 581; Thayer v. Brooks, 17 Ohio, 489, 492; Kinkead, Code Pl. § 35.

The original petition contained two counts, the one for trespass upon land, and the other for taking away and converting to the defendant's use personal property; and the cause of action stated in the second count might have been considered as transitory, although the first was not. McKenna v. Fisk, above cited; Williams v. Breedon, 1 Bos. & P. 329.

But the petition, as amended by the plaintiff on motion of the defendant, and by order and leave of the court, contained a single count, alleging a continuing trespass upon the land by the defendant, through its agents, and its cutting and conversion of timber growing thereon. This allegation was of a single cause of action, in which the trespass upon the land was the principal thing, and the conversion of the timber was incidental only, and could not, therefore, be maintained by proof of the conversion of personal property without also proving the trespass upon real estate. Cotton v. U. S., 11 How. 229; Eames v. Prentice, 8 Cush. 337; Howe v. Wilson, 1 Denio, 181; Dodge v. Colby, 108 N. Y. 445, 15 N. E. 703; Merriman v. Harvesting Mach. Co., 86 Wis. 142, 56 N. W. 743. The entire cause of action was local. The land alleged to have been trespassed upon being in West Virginia, the action could not be maintained in Ohio. The circuit court of the United States, sitting in Ohio, had no jurisdiction of the cause of action, and for this reason, if for no other, rightly ordered the case to be stricken from its docket, although no question of jurisdiction had been made by demurrer or plea. British South Africa Co. v. Companhia De Moçam-

bique [1893] App. Cas. 602, 621; Weidner v. Rankin, 26 Ohio St. 522; Youngstown v. Moore, 30 Ohio St. 133; Rev. St. Ohio. § 5064.

Judgment affirmed.

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§ 5.—CONFLICT OF LAWS IN TRANSITORY ACTIONS.

MORISETTE v. CANADIAN PAC. RY. CO.

(76 Vt. ——; 56 At. 1102.—1904.)

STAFFORD, J. The plaintiff was a brakeman upon one of the defendant's freight trains, and claimed to have been injured through the negligence of the company in maintaining a switch too near the track, so that when he was attempting to mount a moving car he struck against it and was knocked off. The accident occurred in the Province of Quebec, and the declaration, treating the law of the province as matter of fact, alleges that the defendant, as employer of the plaintiff, owed him the care and oversight which the good father of a family owes to his children, and was bound to guard him even against his own mistakes and thoughtlessness; that neither assumption of risk nor contributory negligence constituted a bar to the right of recovery, but operated only to reduce the damages. The defendant objected to any and all evidence of the law of Quebec, upon the ground that, as it was alleged in the declaration, it was "in direct conflict with the law of Vermont, and related, not to the right of action, but solely to the remedy." The objections stated were overruled, an exception was allowed, and the plaintiff introduced evidence in support of his allegations. Under this exception the defendant in this court presents the objection that the plaintiff should not have been permitted to make good his declaration touching the law of the province on the subject of contributory negligence, because he had also alleged that the plaintiff was in fact wholly free from fault; that, having made the latter allegation, he was bound to prove it. This question is not raised by the objection and exception, and is not considered.

It is next objected that evidence as to the law of contributory negligence was inadmissible because it related, not to the right of action, but only to the remedy. But we think it related clearly to the right of action. By the law of Vermont it was a bar; by the law

of Canada, as the evidence in question tended to show, it was not a bar.

It is further objected that the Canadian law, as alleged, although neither criminal nor penal, is so different from ours that we ought not to administer it. Comity does not require us to take up and enforce the law of a foreign state which is contrary to pure morals, or to abstract justice, or to enforce which would be contrary to our own public policy. The law we are considering is not claimed to be open to either of the first two objections, but is claimed to be open to the third, because it is so different from the law of Vermont. Some states have adopted this view, declining to administer foreign laws unless closely analogous to their own. Mexican National Ry. Co. v. Jackson, 89 Tex. 107, 33 S. W. 857, 31 L. R. A. 276, 59 Am. St. Rep. 28; Anderson v. M. & St. P. Ry. Co., 37 Wis. 321; Richardson v. N. Y. C. R. Co., 98 Mass. 85. But we believe the sounder opinion is that a court should not, in otherwise proper cases, refuse to adopt and apply the law of a foreign state, however unlike the law of its own, unless it be contrary to pure morals, or abstract justice, or unless the enforcement would be of evil example, and harmful to its own people, and therefore inconsistent with the dignity of the government whose authority is invoked. Judged by that test, the ruling was correct. Herrick v. Minneapolis, etc., Co., 31 Minn. 11, 16 N. W. 413, 47 Am. Rep. 771; Higgins v. R. Co., 155 Mass. 180, 29 N. E. 534, 31 Am. St. Rep. 544; Dennick v. R. Co., 103 U. S. 11, 26 L. Ed. 439; McLeod v. R. Co., 58 Vt. 727, 6 Atl. 648; Chicago & E. I. R. Co. v. Rouse, 178 Ill. 132, 52 N. E. 951, 44 L. R. A. 410.

WOODEN v. WESTERN ETC. RY.

(Reported, *Infra*, p. 555)

LE FOREST v. TOLMAN.

(117 Mass. 109.—1875.)

Tort, under the Gen. Sts. c. 88, § 59, to recover double the amount of damage sustained from the bite of a dog.

At the trial in the Superior Court, before ALDRICH, J., it appeared that the plaintiff was bitten and injured by the defendant's dog at Pelham, in the State of New Hampshire, where the plaintiff lived with his father and mother; that the defendant was a resident of Dracut, in this Commonwealth, and had a place of business in Lowell, and kept his dog at Dracut and at his place of business in Lowell; that the day the injuries complained of were done the defendant's dog strayed away from his owner into New Hampshire, and was seen several times in the neighborhood of the plaintiff's residence; that the next day the plaintiff's father received the dog and carried him to the defendant at his place of business in Lowell. Upon this state of facts, the defendant asked the judge to rule that the action could not be maintained, which the judge declined to do. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

GRAY, Ch. J. In order to maintain an action of tort, founded upon an injury to person or property, and not upon a breach of contract, the act which is the cause of the injury and the foundation of the action must at least be actionable or punishable by the law of the place in which it is done, if not also by the law of the place in which redress is sought. Smith v. Condry, 1 How. 28; s. c., 17 Pet. 20; The China, 7 Wall. 53, 64; Blad's Case, 3 Swanst. 603; Blad v. Bamfield, ib. 604; General Steam Navigation Co. v. Guillou, 11 M. & W. 877; Phillips v. Eyre, L. R. 4 Q. B. 225, 239, and L. R. 6 Q. B. 1; The Halley, L. R. 2 Adm. 3, and L. R. 2 P. C. 193; Wood v. Wood, 1 Blackf. 71; Wall v. Hoskins, 5 Ired. 177; Mahler v. Norwich & New York Transportation Co., 35 N. Y. 352; Needham v. Grand Trunk Railway, 38 Vt. 294; Richardson v. New York Central Railroad, 98 Mass. 85.

In the case at bar, the injury sued for was done to the plaintiff in New Hampshire by a dog owned and kept by the defendant in Massachusetts. Such an action could not be maintained at common law, without proof that the defendant knew that his dog was accus-

tomed to attack and bite mankind. Popplewell v. Pierce, 10 Cush. 509; Pressey v. Wirth, 3 Allen, 191. No evidence of such knowledge, or of the law of New Hampshire, was introduced at the trial. Nor is it contended that the defendant would be liable to any action or indictment by the laws of that State.

The plaintiff relies upon the statute of this commonwealth, which provides that "every owner or keeper of a dog shall forfeit to any person injured by it double the amount of the damage sustained by him, to be recovered in an action of tort." Gen. Sts. c. 88, § 59. This statute is not a penal, but a remedial statute, giving all the damages to the person injured. Mitchell v. Clapp, 12 Cush. 278. It does not declare the owning or keeping of a dog to be unlawful, but that if the dog injures another person, the owner or keeper shall be liable, without regard to the question whether he had or had not a license to keep the dog. The wrong done to the person injured consists not in the act of the master in owning or keeping, or neglecting to restrain, the dog, but in the act of the dog for which the master is responsible.

The defendant having done no wrongful act in this commonwealth, and the injury for which the plaintiff seeks to recover damages having taken place in New Hampshire, and not being the subject of action or indictment by the laws of that State, this action cannot be maintained.[1]

Exception sustained.

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§ 6.—INDEMNITY BETWEEN WRONGDOERS.

COSTA v. YOACHIM.

(Reported, *Supra*, 486)

[1] Such statute does now exist in New Hampshire; Chickering v. Lord, 67 N. H. 555, 32 Atl. 773 (1893), applying Pub. St. Ch. 118, § 10). Smith v. Condry, 1 How. (U. S.) 28 (1843); Beacham v. Portsmouth Bridge, 68 N. H. 382, 40 Atl. 1066 (1896); Phillips v. Eyre, L. R. 6 Q. B. 1. 40 L. J. Q. B. 28 (1870).

CULMER v. WILSON.

(13 Utah 129; 44 Pac. 833.—1896.)

MINER, J. * * * The questions presented by this appeal are admitted to be: First. Does the plaintiff state a case for indemnity within the recognized exceptions to the rule refusing indemnity between joint tort-feasors? (No question as to the right of partial contribution is made.) Second. Is the husband, under our law, liable for the torts of a woman committed before marriage, and while she was the wife of another man?

The question presented by the first proposition must be treated in the light of the admitted facts, which are that the plaintiff had no personal interest whatever in the proceeding which was instituted to recover possession of the property against Anna Marks, except as agent for Belle Wilson. He was informed by Belle Wilson, and believed in good faith, that Anna Marks was intruding and trespassing upon the property in question, and erecting a building thereon, in violation of her right. He was requested by Belle Wilson to consult an attorney, and cause such proceedings to be taken as would prevent Anna Marks from maintaining her tortious possession of the property. He gave full credit to Belle Wilson's statements as to the wrong being done her; and in pursuance of, and in obedience to, her request, and in reliance upon the merits of her claim, he consulted an attorney, and followed that attorney's directions and advice, and commenced a suit before a Supreme Court commissioner, whose jurisdiction at the time was not defined by law; but he fully believed that said commissioner had jurisdiction to try the case, and judgment was recovered, and execution issued and enforced, in his absence, at Belle Wilson's request. Plaintiff simply sought to advance the interests of Belle Wilson, believing in good faith that she had suffered wrong, and that the said proceedings were proper and lawful to protect her rights. His actions and doings in the premises were as the agent and servant, in her interest and for her benefit, believing she had the rights which she asserted, and that the acts done were legal acts, to enable her to enjoy her own property. In the light of these admitted facts, should Belle Wilson's demurrer be sustained? * * * *

In Nelson v. Cook, 17 Ill. 448, the court say: "Where one is

employed or directed to do or commit a known crime, misdemeanor, trespass, or wrong, and the employee or agent knows it to be such, an express promise of indemnity is void, being against the peace and policy of the law; yet where the question of title to the property is one of doubt, controversy, or uncertainty, and the act to be done is not an apparent wrong, and the person or agent employed or directed to do the act does not know that it is a wrong or trespass, in such case he may sue and recover indemnity from his employer upon an implied assumption, to save himself harmless for the act." * * * The reason given in many books for denying contribution among trespassers is that no right of action can be based upon a violation of the law. When the act is known to be such, or is apparently of that nature, a guilty trespasser places himself without the pale of the law, and a guilty trespasser cannot be allowed to appeal to the law for indemnity. If, however, he be innocent of any illegal purpose, ignorant of the nature of the act which was apparently honest and proper, and he apparently acted in good faith, with an honest purpose, in what appeared to be right, and, from the nature of the case, could not be presumed to know that he was doing an illegal act, and the tort is one arising from construction or inference of law, and not arising from a known meditated wrong, the rule above stated will be changed with the reason, and he may then have contribution. Where a party makes a *bona fide* claim to property, as in this case, and seeks to obtain possession by legal process from a court that he believes has jurisdiction, he may direct his agent to do those acts necessary to be done in asserting those *bona fide* rights; and if it is decided that such claim is invalid, or that the court has no jurisdiction in the eye of the law growing out of the mere relation of the perpetration of the wrong, the maxim of the law that there is no contribution among wrongdoers is not applied, and the law will imply an indemnity to such agent who believes as his principal does, for any damages he was made to pay on account of such acts done in pursuance of his principal's directions, within the scope of his instructions and employment. Cooley, Torts, pp. 145–149; Bailey v. Bussing, 28 Conn. 459; Story, Partn. § 220; Nelson v. Cook, 17 Ill. 448; Betts v. Gibbins, 2 Adol. & E. 57; Gower v. Emery, 18 Me. 83; Mechem, Pub. Off. § 890; Coventry v. Barton, 17 Johns. 142; Acheson v. Miller, 2 Ohio St. 203; Merrill v. City of St. Louis, 12 Mo. App. 467.

The effect of Belle Wilson's instructions was to employ an attor-

ney, commence the suit, and to follow his advice. The proceedings were those advised and conducted by the attorney employed, and the plaintiff believed the proceedings were regular, and that the commissioner had jurisdiction. Under the facts, the plaintiff was not guilty of an intentional tort, nor of committing a known and meditated wrong. In the case of Marks v. Culmer, 6 Utah, 429, 24 Pac. 528, the court said: "In People v. Hills (Utah) 16 Pac. 405, this court said: 'We entertain no doubt that the commissioner is acting in good faith, as there has been diversity of opinion in the profession and among commissioners as to the construction of the statute under consideration.' This applies equally to the parties and attorneys. This was the first authoritative decision of the question."

The respondent contends that the judgment obtained by Anna Marks is conclusive of the liability of each of the defendants, and that they committed the wrong intending to commit it, or did it under circumstances fairly charging them with intending the consequences that followed. In that we cannot agree. The judgment in Marks v. Culmer is only conclusive that all the defendants therein, including the plaintiff, were liable to the injured party. Any other holding would preclude contribution or indemnity in cases of this character. There would be no value to an exception to the general rule that there is no contribution or indemnity between wrongdoers, if the judgment against wrongdoers in favor of the injured party was conclusive that the wrong was intended, and therefore must be a known and meditated tort. Nearly all the cases where indemnity has been allowed were cases in which a judgment had been rendered and paid. We think the admitted facts bring the plaintiff within the exception to the general rule.

For the reasons given, we think the court erred in sustaining the demurrer of Belle Wilson.

§ 7.—CONTRIBUTION AMONG WRONGDOERS.

ARMSTRONG COUNTY v. CLARION COUNTY.

(66 Pa. St. 218.—1870.)

READ, J. The bridge across Red Bank Creek, between the counties of Armstrong and Clarion, at the place known as the Rockport Mills, was a county bridge, maintained and kept in repair at the joint and equal charge of both counties. Whilst John A. Humphreys was crossing the bridge it fell and he was severely injured; he brought suit for damages against the county of Armstrong; and on the trial, under the charge of the court, there was a verdict for the defendant. This was reversed on writ of error (6 P. F. Smith, 204); and upon a second trial there was a verdict for the plaintiff for $1,100 damages, on which judgment was entered. This judgment, with interest and costs, was paid by Armstrong county, and the present suit is to recover contribution from Clarion county. On the trial the learned judge nonsuited the plaintiff on the ground that one of two joint wrongdoers cannot have contribution from the other.

The commissioners of the two counties had examined the bridge in the summer and ordered some repairs, which were made. There can be little doubt that morally Clarion county was bound to pay one-half of the sum recovered from and paid by Armstrong county, and the question is, does not the law make the moral obligation a legal one? Merriweather v. Nixon, 8 Term. R. 186, the leading case on the subject, was of a joint injury to real estate, and for the joint conversion of personal property, being machinery in a mill. In Colburn v. Patmore, 1 Cr. M. & R. 73, the proprietor of a newspaper, who, for a libel published in it, was subjected to a criminal information, convicted and fined, sought to recover from his editor, who was the author of the libel, the expenses which he had incurred by his misfeasance; Lord LYNDHURST said: "I know of no case in which a person who has committed an act declared by the law to be criminal, has been permitted by the law to recover compensation against a person who has acted jointly with him in the commission of the crime."

So in Arnold v. Clifford, 2 Sumner, 238, it was held, a promise to indemnify the publisher of a libel is void. "No one," said Judge

STORY, "ever imagined that a promise to pay for the poisoning of another was capable of being enforced in a court of justice." In Miller v. Fenton, 11 Paige, 18, the wrongdoers were two of the officers of a bank, who had fraudulently abstracted its funds, and of course there could be no contribution between criminals. In the case of The Attorney General v. Wilson, 4 Jurist, 1174, cited in the above case by the chancellor, and also reported in 1 Craig & Phillips, 1, where it was contended that all the persons charged with the breach of trust should be made parties, Lord COTTENHAM said: "In cases of this kind where the liability arises from the wrongful act of the parties, each is liable for all the consequences, and there is no contribution between them, and each case is distinct, depending upon the evidence against each party. It is therefore not necessary to make all parties who may more or less have joined in the act complained of." Seddon v. Connell, 10 Simons, 81, is to the same effect.

In Story on Partnership, sec. 220, after speaking of the general rule that there is no contribution between wrongdoers, the author says: "But the rule is to be understood according to its true sense and meaning, which is, where the tort is a known meditated wrong, and not where the party is acting under the supposition of the entire innocence and propriety of the act, and the tort is merely one by construction, or inference of law. In the latter case, although not in the former, there may be and properly is, a contribution allowed by law for such payments and expenses between constructive wrongdoers, whether partners or not." The case of Adamson v. Jarvis, cited by the learned commentator, is in 4 Bing. 66, in which Lord Chief Justice BEST, after noticing Merriweather v. Nixon, says: "The case of Phillips v. Biggs, Hardress, 164" (which was on the equity side of the Exchequer), "was never decided; but the Court of Chancery seemed to consider the case of two sheriffs of Middlesex, where one had paid the damages in an action for an escape, and sued the other for contribution, as like the case of two joint obligors." From the inclination of the court in this last case, and from the concluding part of Lord KENYON'S judgment in Merriweather v. Nixon, and from reason, justice and sound policy, the rule that wrongdoers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known he was doing an unlawful act.

In Betts v. Gibbins, 2 Ad. & E. 57, Lord DENMAN said: "The

case of Merriweather v. Nixon, 8 T. R. 186, seems to me to have been strained beyond what the decision will bear—the present case is an exception to the general rule. The general rule is, that between wrongdoers there is neither indemnity nor contribution. The exception is where the act is not clearly illegal in itself, and Merriweather v. Nixon, 8 T. R. 186, was only a refusal of a rule *nisi*." "In Adamson v. Jarvis, 4 Bing. 66, we have the observations of a learned person familiar with commercial law." A promise to indemnify against an act not known to the promisee at the time to be unlawful is valid. Coventry v. Barton, 17 Johns. 142; Stone v. Hooker, 9 Cow. 154. In Pearson v. Skelton, 1 Mee. & Wels. 504, where one stage-coach proprietor had been sued for the negligence of a driver, and damages had been recovered against him, which he had paid, and he sought contribution from another of the proprietors, it was held that the rule there is no contribution between joint tort-feasors, does not apply to a case where the party seeking contribution was a tort-feasor only by inference of law, but is confined to cases where it must be presumed that the party knew he was committing an unlawful act. The same doctrine was maintained in Wooley v. Batte, 2 C. & P. 417. These cases have been followed in this court in Horbach's Administrators v. Elder, 6 Harris, 33. "Here," said Judge COULTER, "the plaintiff and defendant are *in equali jure*. The plaintiff has exclusively borne the burden which ought to have been shared by the defendant, who therefore ought to contribute his share." "Contribution," said Lord Chief Baron EYRE, in Dering v. Earl of Winchelsea, 1 Cox, 318, "is bottomed and fixed on general principles of natural justice, and does not spring from contract."

These principles rule the case before us. The parties, plaintiff and defendant, are two municipal corporations, jointly bound to keep this bridge in repair. These bodies can act only by their legally constituted agents, their commissioners, who examine the structure and order repair which is done. They erred in judgment, and both were liable for the consequences of that error, and one having paid the whole of the damage is entitled to contribution from the other.

Judgment reversed, and venire de novo awarded.[1]

[1] In Union Stock Yards Co. v. Chicago, B. & Q. Ry, 196 U. S. 217, 25 Sup. Ct. 226 (1905), Mr. Justice Day seems to revert to the generally discarded doctrine of Merriweather v. Nixon, 8 D. & E. 186 (1799). His opinion con-

CHAPTER VI.

DISCHARGE OF TORTS.

§ 1. TWO SPECIES OF DISCHARGE.—(A) BY AGREEMENT.

HARTFORD FIRE INS. CO. v. CHIC. ETC. RY.

(Reported, *Supra*, p. 256)

GILBERT v. FINCH.

(178 N. Y. 455; 66 N. E. 183.—1903.)

HAIGHT, J. This action was brought by the plaintiff, as receiver of the Commercial Alliance Insurance Company, against the defendants, as directors of that company, to recover the sum of $10,000 and interest. The Commercial Alliance Insurance Company was incorporated under the laws of this state, and continued in business until October, 1894, when the plaintiff was appointed receiver in an action brought for that purpose by the attorney general of the state. The evidence taken upon the trial tends to show that, prior to the bringing of the action by the attorney general, the defendants, and other persons beyond the jurisdiction of the court, were acting as directors of the company, and that they entered into negotiations with the 10 surviving incorporators of the Maine & New Brunswick Insurance Company, a corporation organized under the laws of the state of Maine, for the purchase and control of that company; that

cludes thus: "In the present case the negligence of the parties has been of the same character. Both the railroad company and the terminal company failed, by proper inspection, to discover the defective brake. The terminal company, because of its fault, has been held liable to one sustaining an injury thereby. We do not think the case comes within that exceptional class which permits one wrongdoer who has been mulcted in damages to recover indemnity or contribution from another."

such negotiations were finally consummated on the 3d day of May, 1893, by the president of the Commercial Alliance Company, who, acting in pursuance of the direction of the defendants and their associates, took from the funds of the company $35,000, and paid the same to the 10 surviving incorporators of the Maine & New Brunswick Company, giving to each the sum of $3,500, and taking from them a paper in which they purported to transfer and assign "all their right, title, and interest, as corporators, associates, or otherwise, in said Maine and New Brunswick Insurance Company." Simultaneously with the execution and delivery of this paper, and in pursuance of that agreement, all of the officers and directors of the Maine Company resigned their places, and the same were filled by the defendants, or persons acting for or on their behalf. Shortly thereafter, and on the 22d day of July, 1893, the Maine & New Brunswick Company was judicially declared by the supreme judicial court of Maine to be insolvent, and a receiver was appointed to wind up its affairs. After the plaintiff was appointed receiver of the Commercial Alliance Company, he brought an action against the 10 surviving incorporators of the Maine & New Brunswick Company in the United States circuit court for the district of Maine to recover back the $35,000 which had been paid to them under the direction of the defendants. Subsequently this action was compromised under the direction of the court, the plaintiff receiving from such surviving incorporators the sum of $25,000; and he thereupon executed and delivered to them an instrument in which he released and discharged all of the defendants in that action "from all claims or demands arising from said suit, or the subject-matter thereof, and also from all claims, demands, actions, and causes of action whatsoever in favor of said Commercial Alliance Insurance Company, or of myself as receiver of said company, to date. The execution of this instrument shall not affect any cause of action of the receiver against any person not named herein." * * * *

In considering the effect of the release, we shall assume that the defendants were joint tort feasors with the Maine incorporators, and that the release, under seal, of a claim given to one joint tort feasor, operates as a release of all. Barrett v. Third Ave. R. R. Co., 45 N. Y. 628, 635, and cases there cited. This rule is founded upon the theory that a party is entitled to but one satisfaction for the injury sustained by him. The claim of the plaintiff, as we have seen, was for $35,000. The settlement was for $25,000, leaving

$10,000 of the original claim unpaid and unsatisfied. The instrument given to the Maine incorporators upon the settlement of the plaintiff's suit against them released and discharged them from all further claims or demands, so far as the plaintiff was concerned, but it was expressly provided in the instrument that it should not affect any cause of action on behalf of the receiver against any other person. The purpose of this reservation is very evident. The receiver, doubtless, intended to pursue the defendants for the balance of the claim. The instrument, therefore, does not purport —neither was it intended—to be a full and complete settlement of the plaintiff's entire claim. Reservations of this character in releases are not uncommon, and their effect has been the subject of frequent adjudication by the courts.

It is quite true that the courts of our sister states have reached different conclusions upon the question, and that a sharp conflict exists in the courts of our own state,—as, for instance, Matthews v. Chicopee Mfg. Co., 3 Rob. (N. Y.) 712, and Commercial Nat. Bank v. Taylor, 64 Hun, 499, 19 N. Y. Supp. 533, on one side, and Mitchell v. Allen, 25 Hun, 543, Delong v. Curtis, 35 Hun, 94, and Brogan v. Hanan, 55 App. Div. 92, 66 N. Y. Supp. 917, upon the other side. In England the modern authorities appear to be quite uniform upon the question. They are to the effect that, as between joint debtors and joint tort feasors, a release given to one releases all; but, if the instrument contains a reservation of a right to sue the other joint debtors or tort feasors, it is not a release, but, in effect, is a covenant not to sue the person released, and a covenant not to sue does not release a joint debtor or a joint tort feasor. In the case of Duck v. Mayeu [1892] 2 Q. B. 511, the question was as to whether the plaintiff had released a joint tort feasor. He had accepted from one a sum of money, but without prejudice to his claim against the other. Smith, L. J., in delivering the opinion of the court, said with reference thereto: "In determining whether the document be a release or a covenant not to sue, the intention of the parties was to be carried out; and, if it were clear that the right against a joint debtor was intended to be preserved, inasmuch as such right would not be preserved if the document were held to be a release, the proper construction, where this was sought to be done, was that it was a covenant not to sue, and not a release. In the case of Bateson v. Gosling, at *nisi prius*, the same canon of construction was applied, and it was held that the release being, as it

was, limited by a proviso reserving rights against the surety, it must be taken that it was a covenant not to sue, and not a release; and this ruling was unanimously upheld by the court of common pleas, as reported in Law Rep. 7 C. P. p. 9." In the case of McCrillis v. Hawes, 38 Me. 566, one Lewis and the defendant were charged as joint trespassers upon the plaintiff's premises. They had taken 100 sticks of pine timber. The plaintiff settled with Lewis for one half of the property taken, and brought action against the defendant for the other half. It was held that the action could be maintained, and that the settlement was not a release as to the whole claim. In the case of Ellis v. Esson, 50 Wis. 138, 6 N. W. 518, 36 Am. Rep. 830, it was held that the instrument given to one of several joint wrongdoers is not a technical release if it appears from the paper that it was not the intention of the injured person to release his cause of action against all the wrongdoers, and that the sum received was not in fact a full compensation for his injury, nor intended to be such by the parties to the agreement. In Sloan v. Herrick, 49 Vt. 327, it was held that the release of one joint tort feasor on payment of part satisfaction, when it is expressed in the release that the sum paid is received only in part satisfaction, will not operate to bar the injured party from pursuing the other joint tort feasor for so much of the tort as remains unsatisfied.

We have thus called attention to the English authorities and those of some of our sister states. We have also referred to some of the conflicting cases in our own courts. The question appears to have first received attention here in Kirby v. Taylor, 6 Johns. Ch. 250, 253, in which it was held that a release is to be construed according to the clear intention of the parties, and, where it contains a reservation, the other obligee was not discharged. In the case of Irvine v. Millbank, 56 N. Y. 635, more fully reported in 15 Abb. Prac. (N. S.) 378, the release was, by its terms, to be without prejudice to the rights of the plaintiff as against the other defendants. FOLGER, J., in delivering the opinion of the court, said that this instrument was not a technical release, which it must be to operate as a discharge of a joint tort feasor. And finally, in the case of Whittemore v. Judd Linseed & Sperm Oil Co., 124 N. Y. 565, 27 N. E. 244, 21 Am. St. Rep. 708, the question was examined by BROWN, J., and the conclusion reached that, where a release of one of two joint debtors contains an express provision that it shall not affect or impair the claim of the creditor against the other debtor, the latter is

not discharged. It thus appears that the decisions of this court are in accord with the English rule, and in harmony with our statute in reference to joint debtors. Code Civ. Proc. §§ 1942, 1944. They give force and effect to the intention of the parties to the instrument, which, we think, is more just, and the wiser and safer rule. Where the release contains no reservation, it operates to discharge all the joint tort feasors; but, where the instrument expressly reserves the right to pursue the others, it is not technically a release, but a covenant not to sue, and they are not discharged. It follows that the release, so called, did not operate to discharge the defendants.

The order of the appellate division should be affirmed, and judgment absolute ordered in favor of the plaintiff upon the stipulation, with costs.[1]

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§ 1B.—BY JUDGMENT.

LOVEJOY v. MURRAY.

(3 Wall. 1.—1865.)

Mr. Justice Miller. The record before us raises three questions, all of which depend upon the principles of the common law exclusively for their solution. We will consider them in the order in which they naturally arose on the trial, and in which also they have been argued.

1. Did the defendants, in giving a bond of indemnity to the sheriff, thereby become liable as joint trespassers with him in the proceedings under the attachment? * * * *

The first question must, therefore, be answered in the affirmative.

2. Did the plaintiff, by suing Hayden, the sheriff, alone, recovering judgment for about $6000, and receiving from him $830 on the said judgment, thereby preclude himself from maintaining this suit against these defendants for the same trespass? Is the judgment, or the judgment and part payment, in that case a bar to this action?

PARKE, Baron, in the case of King v. Hoare, 13 M. & W. 502,

[1] *Contra*, Abb. v. Nor. Pac. Ry., 28 Wash. 428, 68 Pac. 954, 58 L. R. A. 293, with valuable note; 92 Am. S. R. 864, with valuable note (1902); McBride v. Scott, 132 Mich. 176, 93 N. W. 243, 61 L. R. A. 445 (1903.)

speaking in reference to the same proposition in its application to actions on joint contracts, says, in 1846, that it is remarkable that the question should never have been decided in England. It is equally remarkable that the proposition here presented should be an open question at this day. The faithful and exhausting research of counsel, in this case, shows that there are conflicting authorities, not only on the main proposition, but on several incidental and collateral points closely connected with it. Two propositions, however, seem to be conceded by all the authorities, which bear with more or less force upon the main question, and which may as well be stated here.

1. That persons engaged in committing the same trespass are joint and several trespassers, and not joint trespassers exclusively. Like persons liable on a joint and several contract, they may all be sued in one action; or one may be sued alone, and cannot plead the nonjoinder of the others, in abatement; and so far is the doctrine of several liability carried, that the defendants, where more than one are sued in the same action, may sever in their pleas, and the jury may find several verdicts, and on several verdicts of guilty may assess different sums as damages.

2. That no matter how many judgments may be obtained for the same trespass, or what the varying amounts of those judgments, the acceptance of satisfaction of any one of them by the plaintiff is a satisfaction of all the others, except the costs, and is a bar to any other action for the same cause.

In the latest English case upon the principal question, namely, Buckland v. Johnson, 15 C. B. 145, JERVIS, Ch. J., holds the former judgment against the son, although fruitless, to be a bar to the second suit against the father for the same goods, upon the ground that by the former judgment the property in the goods was vested in the defendant in the action. As this is the latest cause in the English courts which expressly decides the point, it may, perhaps, be received as the English doctrine. But this concession must be made with some hesitation in view of opinions expressed in other cases decided in the same country. In the very case in which that judgment is rendered, the chief justice takes occasion to correct what he supposes to be an erroneous statement of TINDAL, Ch. J., in Cooper v. Shepherd, to the effect, "that according to the doctrine of the cases which were cited in argument by a former recovery in trover and payment of damages, the plaintiff's right of

property vests in the defendant in that action." It was, therefore, the opinion of Ch. J. TINDAL, that payment of the damages recovered is essential to vest the property in defendant, and this only a few years before the case of Johnson v. Buckland was decided. That case was decided in 1854, and mainly on the authority of Brown v. Wootton, reported in Yelverton, as also by CROKE, J. The reason for the decision, as given by POPHAM, Ch. J., is thus stated in the latter book: "In the cause of action being against divers for which damages uncertain are recoverable, and the plaintiff having judgment against one person for damages certain, that which was uncertain before, is reduced *in rem judicatum,* and to certainty, which takes away the action against others." If the only object, or indeed the principal object, in obtaining a judgment in trespass, was to render certain the extent of plaintiff's injuries, or the amount of damages which would compensate for those injuries, we might be able to comprehend the force of this logic. But as it is the purpose of the law, and the main purpose for which courts of justice are instituted, to procure satisfaction for those injuries, we do not see the sequence in the reasoning of the learned judge.

Brown v. Wootton was decided in Trinity Term, 3 James I. Prior to that time, the law had been thought to be the other way. In Claxton v. Swift, 2 Show. 494, Shower said "it was never pretended, until the case of Brown v. Wootton, that a bare judgment should be a bar." In Cocke v. Jenner, reported by Hobart, and which was in Trinity Term, 12 James I (only nine years after Brown v. Wootton), the question arose on the release of one joint trespasser, which was held to be a bar to a suit against the other, on the ground that it was equivalent to satisfaction; yet the language of the report leaves a strong impression that it was the opinion of the court that several judgments might be had, and that only satisfaction, or its equivalent, would bar proceedings against all who were liable. And the case of Corbett v. Barnes, cited from Sir W. Jones (time of Charles the First), which was an *audita querela,* while it holds that only one satisfaction can be had, implies clearly that several judgments may be rendered against joint trespassers. Indeed, that very case was where one judgment had been rendered in the King's Bench against one, and in the Common Pleas against three others, for the same trespass. These cases show that, after as well as before the case of Brown v. Wootton, the law was supposed, by some of the ablest judges in England, to

be otherwise than what it decides; and we know of no case in which it was followed in England as implicit authority, until Buckland v. Johnson, in 1854.

The rule in that case has been defended on two grounds, and on one or both of these it must be sustained, if at all. The first of these is, that the uncertain claim for damages before judgment has, by the principle of *transit in rem judicatum*, become merged into a judgment which is of a higher nature. This principle, however, can only be applicable to parties to the judgment; for as to the other parties who may be liable, it is not true that plaintiff has acquired a security of any higher nature than he had before. Nor has he, as to them, been in anywise benefited or advanced towards procuring satisfaction for his damages, by such judgment. This is now generally admitted to be the true rule on this subject, in cases of persons jointly and severally liable on contracts; and no reason is perceived why joint trespassers should be placed in a better condition. As remarked by Lord ELLENBOROUGH, in Drake v. Mitchell, 3 East, 258, "A judgment recovered in any form of action, is still but a security for the original cause of action, until it be made productive in satisfaction to the party; and, therefore, till then, it cannot operate to change any other collateral concurrent remedy which the party may have." The second ground on which the rule is defended is, that by the judgment against one joint trespasser, the title of the property concerned is vested in the defendant in that action, and therefore no suit can afterwards be maintained by the former owner for the value of that property, or for any injury done to it. This principle can have no application to trespassers against the person, nor to injuries to property, real or personal, unaccompanied by conversion or change of possession. Nor is the principle admitted in regard to conversions of personal property. Prior to Brown v. Wootton, the English doctrine seems to have been the other way, as shown by Kent (2 Kent, 388), in his Commentaries, referring to Shepherd's Touchstone, Title "Gift" and Jenkins, p. 109, case 88.

We have thus far confined ourselves to the examination of the English authorities, and the principles discussed in them, and we are forced to the conclusion that even at this day the doctrine there is neither well settled nor placed on any satisfactory ground.

In turning our attention to the American cases, we have been able to find but two in which the point directly in issue has been

ruled in favor of the bar of the former judgment; although there are some other cases which hold that the right of property is transferred by the judgment. The first of these two cases is Wilkes v. Jackson, 2 Hen. & M. 355. This was an early case in the Court of Appeals in Virginia, which seems to have passed without much consideration, and was mainly rested on the judgment of the same court in a former case, which does not appear to sustain it. The other is the Rhode Island case of Hunt v. Bates, 7 R. I. 217. It is a very recent case, decided in 1862; but the absence of any other reasoning than a mere recapitulation of the English cases, and the remark that upon their authority the court is obliged to rest its decision, deprives it of any other weight than what should be attached to those cases. This we have already considered. In addition to this, it has been decided in South Carolina and Pennsylvania, that the recovery of a judgment for the value of the goods converted, transfers the title to the defendant. Rogers v. Moore, 1 Rice, 60; Floyd v. Brown, 1 Rawle, 121.

On the other hand in the case of Livingston v. Bishop, 1 John, 290, in the Supreme Court of New York, in 1806, KENT, Ch. J., overrules Brown v. Wootton, and holds that judgment alone is not a bar. In Sheldon v. Kibbe, 3 Conn. 214, decided in 1819, in the Supreme Court of Connecticut, the court, by HOSMER, Ch. J., enters into an elaborate examination of the authorities, and a full consideration of the question on principle, and lays down the doctrine that neither a judgment, nor the taking of the body of the defendant in execution, will bar a second action against a co-trespasser. Nothing short of satisfaction or release can have that effect. In Sanderson v. Caldwell, 2 Aiken, 195, in the Supreme Court of Vermont, in 1826, it is held that neither judgment, nor issuing execution, nor anything short of satisfaction is a bar to a second suit brought against another joint trespasser. Osterhout v. Roberts, 8 Cow. 43, a year later, in the Supreme Court of New York, was a plea that defendant's son had been sued, had a judgment rendered against him, and had been taken in execution and imprisoned sixty days for the same trespass. Yet the plea was held bad. The trespass was for taking a watch. In Elliott v. Porter, 5 Dana, 299, ROBERTSON, Ch. J., of the Court of Appeals of Kentucky, examines the whole subject fully, both on principle and authority, and holds that the first judgment is no bar, and that the title to the property does not pass by judgment in trespass or trover. This case is affirmed by

the same court, in Sharp v. Gray, 5 B. M. 4. Blann v. Cochern, in Alabama, 20 Ala. 320, was an action of trespass. The defendant pleaded a former recovery against a co-trespasser, and payment of the judgment and costs so recovered, to the clerk of the court. But the plea was held bad, because it was not averred that it was accepted by the plaintiff. In Knott v. Cunningham, 2 Sneed, 204, the Supreme Court of Tennessee held that a former judgment against one tort-feasor, was no bar to a suit against another, for the same tort, without satisfaction. In Page v. Freeman, 19 Mo. 421, the Supreme Court of Missouri held the same doctrine. In Floyd v. Browne, 1 Rawle, 125 GIBSON, Ch. J., of Pennsylvania, while holding that after a judgment in trover against two trespassers without satisfaction, plaintiff cannot bring assumpsit against another trespasser, uses this language: "A plaintiff is not compelled to elect between actions that are consistent with each other. Separate actions against a number who are severally liable for the same thing, or against the same defendant on distinct securities for the same debt or duty, are concurrent remedies. Trespass is, in its nature, joint and several, and in separate actions against joint trespassers being consistent with each other, nothing but satisfaction by one will discharge the rest." Trover and assumpsit, however, he holds to be inconsistent remedies.

If we turn from this examination of adjudged cases, which largely preponderate in favor of the doctrine that a judgment, without satisfaction, is no bar, to look at a question in the light of reason, that doctrine commends itself to us still more strongly. The whole theory of the opposite view is based upon technical, artificial and unsatisfactory reasoning.

We have already stated the only two principles upon which it rests. We apprehend, that no sound jurist would attempt, at this day, to defend it solely on the ground of *transit in rem judicatum.* For while this principle, as that other rule, that no man shall be twice vexed for the same cause of action, may well be applied in the case of a second suit against the same trespasser, we do not perceive its force when applied to a suit brought for the first time against another trespasser in the same matter. In reference to the doctrine that judgment alone vests the title of the property converted, in the defendant, we have seen that it is not sustained by the weight of authorities in this country. It is equally incapable of being maintained on principle. The property which was mine, has

been taken from me by fraud or violence. In order to procure redress, I must sue the wrongdoer in a court of law. But, instead of getting justice or remedy, I am told that by the very act of obtaining a judgment—a decision that I am entitled to the relief I ask —the property, which before was mine, has become that of the man who did me the wrong. In other words, the law, without having given me satisfaction for my wrong, takes from me that which was mine, and gives it to the wrongdoer. It is sufficient to state the proposition to show its injustice.

It is said that the judgment represents the price of the property, and as plaintiff has the judgment, the defendant should have the property. But if the judgment does represent the price of the goods, does it follow that the defendant shall have the property before he has paid that price? The payment of the price and the transfer of the property are, in the ordinary contract of sale, concurrent acts. But in all such cases, what has the defendant in such second suit done to discharge himself from the obligation which the law imposes upon him, to make compensation? His liability must remain, in morals and on principle, until he does this. The judgment against his co-trespasser does not affect him so as to release him on any equitable consideration. It may be said that neither does the satisfaction by his co-trespasser, or a release to his co-trespasser do this; and that is true. But when the plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected in equity and good conscience, that the law will not permit him to recover again for the same damages. But it is not easy to see how he is so affected, until he has received full satisfaction, or that which the law must consider as such.

We are, therefore, of opinion that nothing short of satisfaction, or its equivalent, can make good a plea of former judgment in trespass, offered as a bar in an action against another joint trespass, who was not party to the first judgment.

The second question must, therefore, be answered in the negative. * * * *

Affirmed, with costs.

§ 2.—DISCHARGE BY OPERATION OF LAW.

AYLSWORTH v. CURTIS.

(19 R. I. 517; 34 At. 1109.—1896.)

TILLINGHAST, J. This is an action on the case, and was brought under Pub. St. R. I. c. 204, § 22 (now Gen. Laws R. I. c. 233, § 16), for the recovery of the sum of $13,000 for the larceny of certain personal property of the plaintiff, of which crime the defendant is alleged to have been convicted. Said statute provides that "whenever any person shall be convicted of larceny, he shall be liable to the owner of the money or articles taken for twice the value thereof, unless the same be restored, and for the value thereof in case of restoration." Subsequently to the commencement of the action, viz. on April 22, 1895, the plaintiff died, and the defendant thereafter pleaded the said death of the plaintiff in abatement. The plaintiff's executors thereupon entered their appearance in the case, and filed a demurrer to the defendant's plea, and the question presented by the demurrer is whether the cause of action survives the plaintiff's death. The statute relating to the survival of actions (Pub. St. R. I. c. 204, § 8) is as follows, viz.: "In addition to the causes of action and actions which survive, at common law, the death of the plaintiff or defendant therein, the following causes of action and actions shall also survive: First. Causes of action and actions of waste. Second. Causes of action and actions of replevin and trover. Third. Causes of action and actions of trespass and trespass on the case for damages to the person or to real and personal estate."

We think this statute is clearly broad enough to include the case before us unless the action is a penal one, which we will consider later. The cause of action is the damage done by the defendant to the personal estate of the plaintiff in feloniously depriving him of the property set out and described in the indictment. And it certainly cannot be seriously contended that the larceny of personal property from the plaintiff did not result in a direct and immediate damage to his personal estate. * * * The case at bar is clearly one where the act complained of must be held to damage the personal estate of the deceased, and hence the action survives under the decision just referred to, unless it be held to be a penal action as aforesaid.

In support of defendant's contention that the action does not survive at common law or under the provisions of Pub. St. R. I. c. 204, § 8, he relies on Moies v. Sprague, 9 R. I. 541. The action in that case was based on the statutory liability of an officer in a manufacturing corporation. The court held that it was a personal action of tort to recover a penalty, and did not survive at common law, and also that it was not within the statutory provision for the survivorship of actions. The decedent in that case had neglected to perform a statutory duty, the penalty of which was the incurring of a personal liability for the debts of the corporation. It is very clear that such an action does not survive under the statute. It is not within the terms of the statute. The action was not brought to recover damages to the person, or to the real or personal estate of the plaintiff. The defendant had caused no damage to either. He had simply neglected to discharge a statutory duty, whereby a cause of action had accrued to the plaintiff to recover the penalty prescribed therefor. It will be seen, therefore, that the case is clearly distinguishable from the one now before us. See, also, Leighton v. Campbell, 17 R. I. 53, 20 Atl. 14, and Chase v. Curtis, 113 U. S. 452, 5 Sup. Ct. 554. But the defendant's counsel further contends that the action, though civil in form, is nevertheless a penal action, and hence does not survive. And in support of this contention he relies on the cases of Cole v. Groves, 134 Mass. 471, and Yarter v. Flagg, 143 Mass. 280, 9 N. E. 649.

The former was a case brought under the provision of Gen. St. Mass. c. 85, § 1, which authorized a third person to recover treble the value of money lost by gaming, where the person losing neglects to bring an action therefor within three months after the loss. The court held that said statute, "so far as it authorizes a third person to recover three times the sum of money or value of goods lost by gaming, is a penal statute." But it also held that the right of action given to the loser, which was limited to three months, was remedial. The case is therefore not an authority in support of the defendant's contention. The second case was an action of tort, under Pub. St. Mass. c. 99, §§ 1, 2, brought by the plaintiff, who was also an informer, to recover of the owner of a building treble the value of money lost therein by Charles F. Yarter in gaming. The defendant died pending the action, and his executors appeared and filed a motion to dismiss on the ground that the action did not survive, which motion was granted, the court holding that said

statute, in giving an action of tort to a common informer to recover of the owner of a place in which property is lost by gaming treble the value thereof, provides for the recovery of a penalty, and that the action did not survive, either at common law or by Pub. St. Mass. c. 165, § 1. That decision, as well as the former, is doubtless correct; but it is not applicable to the case at bar, for the reason that the present action was not brought by an informer to recover a penalty given by statute, but was brought by the party directly injured, and is now being prosecuted for the benefit of his estate. It was brought to recover damages sustained by the plaintiff by reason of the larceny of his goods, and not to recover a penalty. The statute under which it is brought simply provides a remedy in favor of the person whose goods are stolen, whereby he may recover damages for the wrong and injury sustained, and hence is remedial, and not penal. That is to say, where an action is founded entirely upon a statute, and the only object of it is to recover a penalty or forfeiture, it is clearly a penal action. Hubbell v. Galo, 3 Vt. 266; 18 Am. & Eng. Enc. Law, 270; Barnet v. Bank, 98 U. S. 555. But where the damages are given wholly to the party injured, as compensation for the wrong and injury, the statute having for its object more the indemnification of the plaintiff than the punishment of the defendant, the action is not penal, properly so-called, but remedial. Bones v. Booth, 2 W. Bl. 1226. * * * In Reed v. Northfield, 13 Pick. 94, which was an action on the case upon the statute to recover double damages for an injury to the plaintiff, caused by a defect in the highway, the court held that the action was purely remedial. SHAW, C. J., in delivering the opinion, said: "All damages for neglect or breach of duty operate to a certain extent as punishment, but the distinction is that it is prosecuted for the purpose of punishment, and to deter others from offending in like manner. * * * Here the plaintiff sets out the liability of the town to repair, and an injury to himself from a failure to perform that duty. The law gives him enhanced damages, but still they are recoverable to his own use, and in form and substance the suit calls for indemnity." In Mitchell v. Clapp, 12 Cush. 278, which was an action on Rev. St. Mass. c. 58, § 13, giving double damages against the keeper of a dog in favor of a party sustaining damage by such dog, the court held that the statute was remedial, and not penal. To the same effect are the cases of Frohock v. Pattee, 38 Me. 103; Woodgate v. Knatchbull, 2 Term R. 154, 2 Saund. 345,

note b; Woodward v. Alston, 12 Heisk. 581. See, also, Sedg. St. Const. (2d Ed.) 32; Potter, Dwar. St. 74, 75; End. Interp. St. 333; Hyde v. Cogan, 2 Doug. 702; 8 Am. & Eng. Enc. Law, 270; Mitchell v. Hotchkiss, 48 Conn. 19; Lord Huntingtower v. Gardiner, 1 Barn. & C. 299.

In the late case of Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, the court,—GRAY, J.,—in a very exhaustive opinion, goes so far as to hold that the test whether a law is penal in the strict and primary sense is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual; and that penal laws, strictly and properly, in the international sense, at any rate, are those imposing punishment for an offense committed against the state, and which the executive has the power to pardon. The statute on which the action before us is based is materially different from the Massachusetts statute, which was considered and held to be penal by this court in O'Reilly v. Railroad Co., 16 R. I. 388, 17 Atl. 171, 906, and 19 Atl. 244. Under that statute the damages are "to be assessed with reference to the degree of culpability of the corporation or its servants or agents," and to the amount of at least $500; thus clearly showing a punitive purpose in its enactment. The same statute has since been construed by the Supreme court of Vermont in the case of Adams v. Railroad Co., 67 Vt. 76, 30 Atl. 987, in which the court, in a very clear and forcible opinion by MUNSON, J., arrived at the same conclusion.

The demurrer to the plea in abatement is sustained, and the case remitted to the common pleas division for further proceedings.[1]

[1] In Gordon v. Strong, 158 N. Y. 407, 53 N. E. 33 (1899), it was held that an action by a taxpayer against the Mayor of New York and others, to prevent the waste of public funds, does not abate, under the New York statute which provides that for wrongs done to the property, rights, or interests of another, an action may be brought by the person injured, or, after his death, by his executors or administrators, against such wrongdoer, in the same manner, and with like effect, in all respects, as actions founded upon contracts. In the following section (section 2) it is provided that the preceding section shall not extend to actions for slander, or libel, or for assault and battery, or false imprisonment, nor to actions on the case for injuries to the person of the plaintiff, or to the person of the testator or intestate of any executor or administrator. "It is the action for a tortious injury to the person, therefore, which abates upon the death of the plaintiff; and the Revised Statutes, in the provisions referred to, have made the distinction between such actions and those brought for injuries to the pecuniary rights or interests of the person."

THE "HARRISBURG."

(119 U. S. 199.—1886.)

This is a suit *in rem* begun in the District Court of the United States for the Eastern District of Pennsylvania, on the 25th of February, 1882, against the steamer "Harrisburg," by the widow and child of Silas E. Richards, deceased, to recover damages for his death caused by the negligence of the steamer in a collision with the schooner "Marietta Tilton," on the 16th of May, 1877, about one hundred yards from the Cross Rip Light Ship, in a sound of the sea embraced between the coast of Massachusetts and the islands of Martha's Vineyard and Nantucket, parts of the State of Massachusetts. The steamer was engaged at the time of the collision in the coasting trade, and belonged to the port of Philadelphia, where she was duly enrolled according to the laws of the United States. The deceased was first officer of the schooner, and a resident of Delaware, where his widow and child also resided when the suit was begun. Reported below in 15 Fed. Rep. 610.

Mr. Chief Justice WAITE. The question to be decided presents itself in three aspects, which may be stated as follows:

1. Can a suit in admiralty be maintained in the courts of the United States to recover damages for the death of a human being on the high seas, or waters navigable from the sea, caused by negligence, in the absence of an act of Congress, or a statute of a State, giving a right of action therefor?

2. If not, can a suit *in rem* be maintained in admiralty against an offending vessel for the recovery of such damages when an action at law has been given therefor by statute in the State where the wrong was done, or where the vessel belonged?

3. If it can, will the admiralty courts permit such a recovery in a suit begun nearly five years after the death, when the statute which gives the right of action provides that the suit shall be brought within one year?

It was held by this court, on full consideration, in Insurance Company v. Brame, 95 U. S. 756, "that by the common law no civil action lies for an injury which results in death." See, also, Dennick v. Railroad Co., 103 U. S. 11, 21. Such also is the judgment of the English courts, where an action of the kind could not be

maintained until Lord CAMPBELL'S Act, 9 and 10 Vict. c. 93. It was so recited in that act, and so said by Lord BLACKBURN in Seward v. The Vera Cruz, 10 App. Cas. 59, decided by the House of Lords in 1884. Many of the cases bearing on this question are cited in the opinion in Insurance Co. v. Brame. Others will be found referred to in an elaborate note to Carey v. Berkshire Railroad, 1 Cush. 475; in 48 Am. Dec. 616, 633. The only American cases in the common-law courts against the rule, to which our attention has been called, are Cross v. Guthery, 2 Root, 90; S. C. 1 Am. Dec. 61; Ford v. Monroe, 20 Wend. 210; James v. Christy, 18 Missouri, 162; and Sullivan v. Union Pacific Railroad, 3 Dillon, 334. Cross v. Guthery, a Connecticut case, was decided in 1794, and cannot be reconciled with Goodsell v. Hartford & New Haven Railroad, 33 Conn. 55, where it is said: "It is a singular fact, that by the common law the greatest injury which one man can inflict on another, the taking of his life, is without a private remedy." Ford v. Monroe, a New York case, was substantially overruled by the Court of Appeals of that State in Green v. Hudson River Railroad, 2 Keyes. 294; and Sullivan v. Union Pacific Railroad, decided in 1874 by the Circuit Court of the United States for the District of Nebraska, is directly in conflict with Insurance Co. v. Brame, decided here in 1878.

We know of no English case in which it has been authoritatively decided that the rule in admiralty differs at all in this particular from that at common law. Indeed, in The Vera Cruz, *supra*, it was decided that even since Lord Campell's Act a suit *in rem* could not be maintained for such a wrong. Opinions were delivered in that case by the Lord Chancellor (SELBORNE), Lord BLACKBURN and Lord WATSON. In each of these opinions it was assumed that no such action would lie without the statute, and the only question discussed was whether the statute had changed the rule.

In view, then, of the fact that in England, the source of our system of law, and from a very early period one of the principal maritime nations of the world, no suit in admiralty can be maintained for the redress of such a wrong, we proceed to inquire whether, under the general maritime law as administered in the courts of the United States, a contrary rule has been or ought to be established. (After considering Plummer v. Webb, 1 Ware, 75, decided in 1825, and Cutting v. Seabury, 1 Sprague, 522, decided by Judge SPRAGUE in the Massachusetts district in 1860, the learned Judge proceeded.)

Next followed the case of The Sea Gull, Chase's Dec. 145, decided by Chief Justice CHASE in the Maryland district in 1867. That was a suit *in rem* by a husband to recover damages for the death of his wife caused by the negligence of the steamer in a collision in the Chesapeake Bay, and a recovery was had, the Chief Justice remarking that "There are cases, indeed, in which it has been held that in a suit at law no redress can be had by the surviving representation for injuries occasioned by the death of one through the wrong of another; but these are all common-law cases, and the common law has its peculiar rules in relation to this subject, traceable to the feudal system and its forfeitures," and "it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules." In his opinion he refers to the leading English case of Baker v. Bolton, 1 Camp. 493, where the common-law rule was recognized and followed by Lord ELLENBOROUGH in 1808, and to Carey v. Berkshire Railroad, 1 Cush. 475; S. C. 48 Am. Dec. 616, to the same effect, decided by the Supreme Court of Massachusetts in 1848, and then says that "in other States the English precedent has not been followed." For this he cites as authority Ford v. Munroe, *supra,* decided in 1838, but which, as we have seen, had been overruled by Green v. Hudson River Railroad in 1866, only a short time before the opinion of the Chief Justice was delivered, and James v. Christy, 18 Missouri, 162, decided by the Supreme Court of Missouri in 1853. The case of The Highland Light, Chase's Dec. 150, was before Chief Justice CHASE in Maryland about the same time with The Sea Gull, and while adhering to his ruling in that case, and remarking that "the admiralty may be styled, not improperly, the human Providence which watches over the rights and interests of those 'who go down to the sea in ships and do their business on the great waters,'" he referred to a Maryland statute giving a right of action in such cases, and then dismissed the libel because on the facts no liability was established against the vessel as an offending thing. * * * *

It thus appears that prior to the decision in Insurance Co. v. Brame the admiralty judges in the United States did not rely for their jurisdiction on any rule of the maritime law different from that of the common law, but on their opinion that the rule of the English common law was not founded in reason, and had not become

firmly established in the jurisdiction of this country. Since that decision the question has been several times before the Circuit and District Courts for consideration. In The David Reeves, 5 Hughes 89, Judge MORRIS, of the Maryland district, considering himself bound by the authority of The Sea Gull, which arose in his district, and had been decided by the Chief Justice in the Circuit Court, maintained jurisdiction of a suit *in rem* by a mother for the death of her son in a collision that occurred in the Chesapeake Bay. He conceded, however, that this was contrary to the common law and to the admiralty decisions in England, but as the question never had been passed on in this court, he yielded to the authority of the Circuit Court decision in his own district.

The last American case to which our attention has been called is that of The Columbia, 27 Fed. Rep. 900, decided by Judge BROWN of the Southern District of New York, during the present year. In giving his opinion, after referring to the fact that, as he understood, the question was then pending in this court, the judge said: "Awaiting the result of the determination of that court, and without referring to the common-law authorities, I shall hold in this case, as seems to me most consonant with equity and justice, that the pecuniary loss sustained by persons who have a legal right to support from the deceased, furnishes a ground of reclamation against the wrongdoer which should be recognized and compensated in admiralty."

In Monaghan v. Horn, *in re* The Garland, 7 Canada Sup. Ct. 409, the Supreme Court of Canada held that a mother could not sue in her own name in admiralty for the loss of the life of her son, on the ground that no such action would lie without the aid of a statute, and the statute of the Province of Ontario, where the wrong was done, and which was substantially the same as Lord Campbell's act, provided that the action should be brought in the name of the administrator of the deceased person. No authoritative judgment was given as to the right of an administrator to sue in admiralty under that act. This was in 1882, before The Vera Cruz, *supra*, in the House of Lords.

Such being the state of judicial decisions, we come now to consider the question on principle. It is no doubt true that the Scotch law "takes cognizance of the loss and suffering of the family of a person killed," and gives a right of action therefor under some circumstances. Bell's Prin. Laws of Scot., 7th ed., p. 934, § 2029; Cadell v. Black, 5 Paton, 567; Weems v. Mathieson, 4 Macqueen,

215. Such also is the law of France. 28 Merlin, Répertoire, 442, *verbo* Réparation Civile, § iv; Roland v. Goose, 19 Sirey, Cour de Cassation 269. It is said also that such was the civil law, but this is denied by the Supreme Court of Louisiana in Hubgh v. The New Orleans & Carollton Railroad, 6 La. Ann. 495; S. C. 54 Am. Dec. 565, where Chief Justice EUSTIS considers the subject in an elaborate opinion after full argument. A reargument of the same question was allowed in Hermann v. New Orleans & Carollton Railroad, 11 La Ann. 5, and the same conclusion reached after another full argument. (See also Grueber's Lex Aquilia, 17.) But however this may be, we know of no country that has adopted a different rule on this subject for the sea from that which it maintains on the land, and the maritime law, as accepted and received by maritime nations generally, leaves the matter untouched. It is not mentioned in the laws of Cleron, of Wisbuy, or of the Hanse Towns, 1 Pet. Adm. Dec. Appx.; nor in the Marine Ordinance of Louis XIV., 2 Pet. Adm. Dec. Appx.; and the understanding of the leading text writers in this country has been that no such action will lie in the absence of a statute, giving a remedy at law for the wrong. (Benedict Adm., 2d ed., § 309; 2 Parsons' Ship. & Adm. 350; Henry, Adm. Jur. 74.) The argument everywhere in support of such suits in admiralty has been, not that the maritime law, as actually administered in common-law countries, is different from the common law in this particular, but that the common law is not founded on good reason, and is contrary to "natural equity and the general principles of law." Since, however, it is now established that in the courts of the United States no action at law can be maintained for such a wrong in the absence of a statute giving the right, and it has not been shown that the maritime law, as accepted and received by maritime nations generally, has established a different rule for the government of the courts of admiralty from those which govern courts of law in matters of this kind, we are forced to the conclusion that no such actions will lie in the courts of the United States under the general maritime law. The rights of persons in this particular under the maritime law of this country are not different from those under the common law, and as it is the duty of courts to declare the law, not to make it, we cannot change this rule. * * * *

The decree of the Circuit Court is reversed, and the cause remanded, with instructions to dismiss the libel.[1]

[1] The Supreme Court of Hawaii, as early as 1860, adopted the Scotch rule

HOUGHKIRK v. PRES'T, ETC. D. & H. C. CO.

(92 N. Y. 219.—1883.)

FINCH, J. The jury in this case rendered a verdict of $5000 as their estimate of damages resulting to the next of kin from the death of a little girl killed by a switch engine of the defendant. The evidence showed that she was about six years old; an only child; bright, intelligent and healthy; and the daughter of a market gardener. This, and the circumstances of her death, constituted the only proof bearing on the question of damages, and which served as a basis for the judgment of the jury in estimating the pecuniary loss suffered by the next of kin. The General Term declined to set aside the verdict as excessive, assigning as a reason in the opinions delivered that the doctrine of this court as to damages in such a case leaves it impossible to say in any instance that they are excessive, and involves an utter surrender of the right of the General Term to order a new trial for that reason. The defendant alleges error in this ruling, and insists that the verdict was wholly unwarranted by the evidence; that there was no proof of facts from which even a plausible conjecture of the amount of damages could be derived; that the verdict indicated partiality or prejudice; and the case should be remitted to the General Term for the consideration which had been withheld. We have quite carefully examined the authorities cited in the opinion below (Ihl v. Forty-second St. etc. R. R. Co., 47 N. Y. 317; 7 Am. Rep. 450; Oldfield v. N. Y. & H. R. R. Co., 14 N. Y. 310; O'Mara v. Hudson R. R. R. Co., 38 id. 445; McGovern v. N. Y. C. & H. R. R. R. Co., 67 id. 417); and nearly or quite all of the other cases bearing on the subject. Most of them recognize the difficulty inherent in suits founded upon the statute, and seek in good faith to make operative the will of the legislature in a new and before unknown class of actions. None of those decisions purport in any manner to narrow the right and discretion of the General Term to set aside verdicts for excessive damages, but on the contrary all are consistent with its survival,

upon this topic, in preference to what is termed "the old harsh rule," of the common law, which it declared, "had its origin in feudal times," See, Kake v. Horton, 2 Hawaii, 209 (1860); Schooner Robert Lewis Co. v. Kekanoha, 114 Fed. 849 (1902.)

and some expressly recognize it. Oldfield v. N. Y. & Harlem R. R. Co., 14 N. Y. 314; Ihl v. Forty-second St. &c. R. R. Co., 47 id. 321; 7 Am. Rep. 450. Undoubtedly there are difficulties in the way of its judicious exercise, but so far as these exist they spring from the inherent nature of the subject, and obedience to the command of the legislature.

The statute implies from the death of the person negligently killed damages sustained by the next of kin. Quin v. Moore, 15 N. Y. 432. Recognizing the generally prospective and indefinite character of those damages, and the impossibility of a basis for accurate estimate, it allows a jury to give what they shall deem a just compensation, and limits their judgment to a sum not exceeding $5000. Tilley v. Hudson Riv. R. R. Co. 29 N. Y. 252. But within that range the jury is neither omnipotent, nor left wholly to conjecture. They are required to judge, and not merely to guess and, therefore, such basis for their judgment as the facts naturally capable of proof can give should always be present, and is rarely, if ever, absent. The pecuniary loss in any such case may be composed of very different elements. It may consist of special damages, that is of an actual, definite loss, capable of proof, and of measurement with approximate accuracy; and also of prospective and general damages, incapable of precise and accurate estimate because of the contingencies of the unknown future. An example of such special and actual damages occurred in the case of Murphy v. N. Y. Central &c. R. R. Co., 88 N. Y. 446, where we allowed as one element of the total loss the funeral expenses of the deceased. To such an item the doctrine of Leeds v. Met. Gas-light Co., 90 N. Y. 26, would have a proper application. To prove merely that there were funeral expenses, and, without evidence of their character or amount, or even that they were usual and ordinary, to permit the jury to guess at their amount as an element of the total loss, would be to substitute conjecture for proof where proof was possible, and a proper basis of judgment attainable.

But the value of a human life is a different matter. The damages to the next of kin in that respect are necessarily indefinite, prospective and contingent. They cannot be proved with even an approach to accuracy, and yet they are to be estimated and awarded, for the statute has so commanded. But even in such case there is and there must be some basis in the proof for the estimate, and that was given here and always has been given. Human lives are not

all of the same value to the survivors. The age and sex, the general health and intelligence of the person killed, the situation and condition of the survivors and their relation to the deceased; these elements furnish some basis for judgment. That it is slender and inadequate is true, Tilley v. Hudson River R. R. Co., *supra;* but it is all that is possible and while that should be given, McIntyre v. N. Y. Cent. R. R. Co., 37 N. Y. 289, more cannot be required. Upon that basis, and from such proof the jury must judge, and having done so, it is possible, though not entirely easy, for the General Term to review such judgment and set it aside if it appears excessive, or the result of sympathy and prejudice. A difficult duty we grant; but not for that reason to be abandoned. In its intrinsic nature it is no more difficult than to determine whether a verdict is excessive in an action for slander or libel where the injury is to reputation, or in actions where pain and suffering may be considered in ascertaining the loss. The Supreme Court has never abdicated its power of review in such cases and should not in those under the statute. The jury are compelled to judge in an atmosphere freighted with sympathy. In the General Term the deliberation may be more cool and thoughtful, and while the judgment of the trial court should not be lightly disturbed, it should not be held necessarily conclusive. But it is impossible for us to say that such error has been committed in the present case. We cannot go to the opinions delivered to ascertain, and must assume that the order which denied a new trial for excessive or partial damages, and which was affirmed by the General Term, was made after due and proper consideration, and in the full performance of the duty of review which we have always upheld and have not at all narrowed or infringed. * * * *

The judgment was reversed on another ground.

WOODEN v. WESTERN N. Y. ETC. CO.

(126 N. Y. 10; 26 N. E. 1050.—1891.)

FINCH, J. This appeal is from an interlocutory judgment overruling a demurrer and determining that the complaint assailed stated a good cause of action. That pleading alleged that the plain-

tiff was and is a resident of this State, and the defendant a corporation created and existing under our laws. The contest thus is between a resident individual and a domestic corporation. The letter owned and operated a line of railroad extending beyond our boundaries into the adjoining State of Pennsylvania, and the complaint alleged that in that State the plaintiff's husband was killed by the negligence of the defendant company. The complaint further averred that the statutes of that State gave a right of action for the injury sustained by the widow and children; that the remedy could be enforced in the name of the former as plaintiff, but for her own benefit and that of the children; and that such statute was of similar import to that existing in our own jurisdiction. Judgment was thereupon demanded for damages in the sum of $20,000. The demurrer interposed, raised two objections: First, that the statutes of the two States were not similar, but different; and, second, that the action could not be maintained here in the name of the widow, but only in that of an executor or administrator of the deceased; and the final result sought to be established was that the widow could not maintain an action in this State because that is contrary to our statute, and that the administratrix could not because that is contrary to the Pennsylvania statute: and so there is no remedy whatever in our jurisdiction.

Certain propositions essential to the inquiry before us have been explicitly determined in McDonald v. Mallory, 77 N. Y. 546, and need no other citation for their support. That case held that the liability of a person for his acts, whether wrongful or negligent, depends in general upon the law of the place in which the acts were committed; that actions for injuries to the person in another State are sustained here without proof of the *lex loci*, because they are permitted by the common law which is presumed to exist in the foreign State; that such presumption does not arise where the right of action depends upon a statute which confers it; and that in such case the action can only be maintained here by proof that the statutes of the State in which the injury occurred give the right of action, and are similar to our own. Upon the question of similarity we have also held that the two statutes need not be identical in their terms, or precisely alike, but it is enough if they are of similar import and character, founded upon the same principle, and possessing the same general attributes. Leonard v. Navigation Co., 84 N. Y. 53. It is quite evident that the two statutes are of similar import.

They are founded upon the same principle, are aimed at the same evil, construct the same sort or kind of action, and give it for the benefit of the same class of individuals. In both the utter failure of redress at common law where the injury ended in death was the injustice for which a remedy was enacted; and in both the new action was given for the benefit of those who had suffered an injury as the consequence of the wrong. This fundamental agreement in the main and substantial characteristics of the two statutes is not affected by the differences of detail which the demurrer points out. The first is that by the *lex loci* the proper person to bring this action, and the only person who can maintain it, is the widow; while by our law the right of action is given to the executor or administrator. But it is given to the latter not in his broad representative character, but solely as trustee, in a case like the present, for the widow and children. Hegerich v. Keddie, 99 N. Y. 267. It is not a right which survives to the personal representatives, but a right created anew. The real parties in interest,—those whose injury is redressed, whose right is vindicated, to whom all damages go,—are one and the same in both forums. If the formal parties are different, the substantial and real parties are identical, and the difference in the trustee appointed by the law to represent their right is not such a difference as to bar our tribunals from their jurisdiction, or make the two statutes dissimilar under the rule.

It is claimed, however, that, even in that event, the right of action accruing in the place of the transaction can only be enforced in our jurisdiction under our remedial forms, and so should have been brought by the plaintiff, not as a widow, but as administratrix, to which office she had been appointed in this State. But it must not be forgotten that the cause of action sued upon is the cause of action given by the *lex loci,* and vindicated here and in our tribunals upon principles of comity. (84 N. Y. 53, *supra.*) That cause of action is given to the widow in her own right and as trustee for the children, and we open our courts to enforce it in favor of the party who has it, and not to establish a cause of action under our statute which never in fact arose. We refer to the *lex fori,* and measure it by and compare it with the *lex loci,* I think, for two reasons,—one, that the party defendant may not be subjected to different and varying responsibilities; and the other, that we may know that we are not lending our tribunals to enforce a right which we do not recognize, and which is against our own public policy; and we do

not refer to our law as creating the cause of action which we enforce. It is the cause of action created and arising in Pennsylvania which our tribunals vindicate upon principles of comity; and, therefore, must be prosecuted here in the name of the party to whom alone belongs the right of action; and that rule the courts of Pennsylvania enforce where the cause of action arises here, by permitting it to be brought by the executor or administrator to whom by our law the right is given, although not by their own. Usher v. Railroad Co., 126 Pa. St. 207; 17 Atl. Rep. 597.

But the second difference relied on is that in Pennsylvania there is no restriction upon the amount of damages which may be recovered, while in our State they cannot exceed $5000. That restriction pertains to the remedy, rather than the right. Dennick v. Railroad Co., 103 U. S. 11. It is a limitation upon the discretion of the jury in fixing the amount of damages, but not upon the right of action, or its inherent elements and character. The restriction indicates our public policy as to the extent of the remedy, and the plaintiff who chooses to avail herself of our remedial procedure must submit to our remedial limitation, and be content with a judgment beyond which our courts cannot go. They cannot exceed it in a case arising here, and no principle of comity requires them to enlarge the remedy which the plaintiff voluntarily seeks. There may be—there very possibly is—an exception to that rule, resting upon its own peculiar reasons, in a case where the defendant is not, as here, a domestic corporation, formed under our law, and so entitled to the benefit of our remedial limitations, but is a corporation of the State within whose jurisdiction the cause of action arose, and by whose law no restriction upon the amount of damages is permitted or enacted. We do not decide that question; but the same reasoning which would expose such a corporation to the law of its own jurisdiction would serve equally to justify the right of the domestic corporation to be protected by the remedial limitations of its jurisdiction. The difference between the two statutes, therefore, does not strictly affect the rule of damages, but rather the extent of damages; and that extent, as limited or unlimited, does not enter into any definition of the right enforced, or the cause of action permitted to be prosecuted; and so the causes of action in the two forums are not thereby made dissimilar. These views lead to an affirmance of the interlocutory judgment. All concur.[1]

[1] *Cf.* Slater v. Mex. Nat. Ry. 194 U. S., 120, 24 Sup. Ct. 581, (1904), where

WILLIAMS v. ST. LOUIS & S. F. RY. CO.

(123 Mo. 573; 27 S. W. 887.—1894.)

GANTT, P. J. 1. The first assignment of error is that the circuit court wrongfully struck out defendant's plea of the several statutes of limitations of Kansas. As those statutes are pleaded at length in the answer, the motion to strike out was, in effect, a demurrer. The defendant insists that the statute of limitations of Kansas not only bars the remedy, but extinguishes the right of action, and that, as the injury occurred in Kansas, the right of action accrued there, and, the limitation in that state being two years, the plaintiff is barred, although, by the laws of this state, of which both plaintiff and defendant are residents, the limitation for such an action as this is five years. Section 25 (section 3546, Comp. Laws Kan. 1878) declares: "When a right of action is barred by the provisions of any statute, it shall be unavailable either as a cause of action or ground of defense." And the statute relied on as creating the bar in this case (section 3539) provides: "Civil actions for injury to the right of another, not arising out of a contract, can only be brought within two years after such injury shall have accrued and not afterwards." We think that these two sections are only ordinary statutes of limitations, which affect the remedy only, and do not extinguish the right, and are so construed by the courts of this state and Kansas, as we understand them. Carson v. Hunter, 46 Mo. 467; Stirling v. Winter's Ex'rs, 80 Mo. 141; McMerty v. Morrison, 62 Mo. 140; Elder v. Dyer, 26 Kan. 604; Sibert v. Wilder, 16 Kan. 176.

But, if said statutes were to be construed as statutes extinguishing the right, still defendant's answer does not bring it within the distinction first made by Judge Story between statutes which affect the remedy and those affecting the right, because his qualification of that rule required that both parties should continue to reside in the state where the law extinguishing the right of action prevails during the

the majority of the court held that, "Damages in the nature of alimony and pensions during necessity, or until marriage, given by the Mexican law to the wife and children of one wrongfully killed in Mexico by a railroad company, cannot be commuted into a lump sum by a jury in a common law action brought in a Circuit Court of the United States." But see dissenting opinion of Fuller, C. J., Harlan and Peckham, JJ

full period of limitations, so that it could act both upon the parties and the cause of action. Now, there is no averment in this plea that plaintiff and defendant were either residents of Kansas for two years after this action accrued. The mere allegation that defendant had agents in Kansas, who could have been served during all that time, by no means brings it within the rule. Le Roy v. Crowningshield, 2 Mason, 151, Fed. Cas. No. 8,269; Huber v. Steiner, 2 Bing. N. C. 202; Wood, Lim. (2d Ed.) p. 34, § 8. Statutes of limitations constitute a part of the *lex fori* of every civilized country, and, like other remedies, are governed by the law of the place where the action is brought or remedy is sought.

This action is brought in the courts of Missouri, and plaintiff is entitled to the remedies afforded by our laws, unless defendant can bring itself within the qualification made by Judge STORY, and approved by this court in McMerty v. Morrison, 62 Mo. 140, and this he has not done. Carson v. Hunter, 46 Mo. 467; Amy v. Dubuque, 98 U. S. 470; Pritchard v. Norton, 106 U. S. 124, 1 Sup. Ct. 102; Bank v. Eldred, 130 U. S. 693, 9 Sup. Ct. 690. Moreover, plaintiff's cause of action is founded upon a tort at common law. He was a citizen of this state when the injury occurred to him in Kansas. He returned at once to his home, in this state, and has never since resided in Kansas. His cause of action was good wherever the common law prevailed, and he brought his action within the time prescribed by our statutes in such cases. In such a case the law of the forum governs whether the right of action depends upon the common law or a local statute, unless the local statute which creates the right also limits the duration of the right within a prescribed time. The court committed no error in striking out the plea of the statute of limitations. It constituted no defense. Wood, Lim. p. 23, § 9; Nonce v. Railroad Co., 33 Fed. 429; The Harrisburg, 119 U. S. 199, 7 Sup. Ct. 140; Railroad Co. v. Hine, 25 Ohio St. 629; O'Shields v. Railway Co., 83 Ga. 621, 10 S. E. 268.

CHAPTER VII.

§ 2.—FALSE IMPRISONMENT.

GENNER v. SPARKES.

(1 Salk. 79; 6 Mod. 173.—1704.)

Genner, a bailiff, having a warrant against Sparkes, went to him in his yard, and, being at some distance, told him he had a warrant, and said he arrested him. Sparkes, having a fork in his hand, keeps off the bailiff from touching him, and retreats into his house. And this was moved as a contempt. *Et per Curiam.* The bailiff cannot have an attachment, for here was no arrest nor rescous. Bare words will not make an arrest; but if the bailiff had touched him, that had been an arrest, and the retreat a rescous, and the bailiff might have pursued and broke open the house, or might have had an attachment or a rescous against him; but as this case is, the bailiff has no remedy, but an action for the assault; for the holding up of the fork at him when he was within reach, is good evidence of that.

RUSSEN v. LUCAS.

(1 Car. & P. 153.—1824.)

Action against the sheriff for an escape. The only point in dispute was, whether a person named Hamer was arrested by the sheriff's officer, and escaped. The officer having the warrant went to the One Tun Tavern in Jermyn Street, where Hamer was sitting. He said: "Mr. Hamer, I want you." Hamer replied, "Wait for me outside the door, and I will come to you." The officer went out to wait, and Hamer went out at another door, and got away.

ABBOTT, C. J. Mere words will not constitute an arrest; and if the officer says, "I arrest you," and the party runs away, it is no

escape; but if the party acquiesces in the arrest, and goes with the officer, it will be a good arrest. If Hamer had gone even into the passage with the officer, the arrest would have been complete; but, on these facts, if I had been applied to for an escape-warrant, I would not have granted it.

Nonsuit.

SMITH v. STATE.

(7 Humph. 43.—1846.)

Rodgers, with horse and carryall, was carried over the Chucky river by Smith in his ferry-boat. Smith was the keeper of a public ferry. When over Smith demanded ferriage, which Rodgers said was already paid: on this a dispute occurred, and Smith told him he should not go on till he paid the ferriage. Some other conversation ensued, when Rodgers paid the ferriage demanded. Rodgers was detained ten or fifteen minutes. An indictment was found against Smith for an assault and false imprisonment.

Rodgers stated on the trial before R. M. Anderson, presiding judge, and a jury of Cocke County, that Smith had not touched his bridle or his horse; that he made no effort to strike or touch his person or his horse, and that he made no threats of personal violence, but that he was afraid of a difficulty with Smith. Smith told Rodgers after he had paid the charge, that if he had not paid it he had determined to have put his carryall and horse back into the boat, and to have carried them back. A verdict and judgment were rendered for the State, and defendant appealed.

GREEN, J. The plaintiff in error was indicted for an assault and false imprisonment of Mark M. Rodgers. The court charged the jury, "That to make out the offense as charged, no actual force was necessary, but that a man might be assaulted by being beset by another; and if the opposition to the prosecutor's going forward was such as a prudent man would not risk, then the defendant would, in contemplation of law, be guilty of false imprisonment."

This charge is correct in all its parts, and the facts were fairly left to the jury. A verdict of guilty has been pronounced, and we do not feel authorized to disturb it. The prosecutor and defendant disputed about the ferriage defendant claimed. Smith insisted

upon this demand, and said he did not choose to sue every man that crossed at his ferry. Although he did not take hold of the prosecutor, or offer violence to his person, yet his manner may have operated as a moral force to detain the prosecutor.

And this appears the more probable, as after the affair was settled, the prosecutor inquired what defendant would have done if he had not paid the ferriage demanded, to which the defendant replied, "he would have put his carryall and horse back into the boat and taken them across the river again." As this determination existed in his mind, it doubtless was exhibited in the manner of the defendant, and thus operated upon the fears of the prosecutor.[1]

Affirm the judgment.

SIMMONS v. RICHARDS.

(171 Mass. 281; 50 N. E. 617.—1898.)

ALLEN, J. An arrest may be made without actually touching the person. It is enough if the party is within the power of the officer, and submits to the arrest. Mowry v. Chase, 100 Mass. 79, 85. The evidence in the present case was sufficient to warrant the finding of an arrest on June 14th. There was testimony that the defendant went to Underwood's house in the evening, said he had an execution for his arrest, showed it to him, asked him what he was going to do, said he would have to take him to jail, told him that he had an assistant in attendance whom he could leave with him that night; that the defendant, with his assistant, went with Underwood, by the latter's request, to Station No. 2, where Underwood, in defendant's presence, told the sergeant, and afterwards the chief of police, that he was under arrest, which was not contradicted by the defendant; and, finally, that the defendant let him go upon assurances that he would come to defendant's office the next morning. Without detailing further testimony, the jury might find from the above that

[1] McNay v. Stratton, 9 Bradw. 215; Hildebrand v. McCrum, 101 Ind. 61; Fotheringham v. Adams Ex. Co., 36 Fed. R. 252 (shadowed by detectives), *accord*. Personal coercion necessary to arrest. (Hill v. Taylor, 50 Mich. 549; State v. Lunsford, 81 N. C. 528; see 61 Am. Dec. 152, and note.)

It is not false inprisonment for a teacher to detain a pupil a short time after school hours. (Fertich v. Mishner, 111 Ind. 472; 60 Am. R. 709.)

the defendant intended to take Underwood into his custody, and had him within his power; that Underwood submitted to the arrest; and that the defendant voluntarily discharged him. If that was so done, the defendant had no authority to arrest Underwood again on the same execution, and the arrest on June 27th was illegal. This is conceded by the defendant. Houghton v. Wilson, 10 Gray, 365.[1]

JACKSON v. KNOWLTON.

(173 Mass. 97; 52 N. E. 134.—1899.)

LATHROP, J. It appears from the bill of exceptions that the plaintiff was arrested and imprisoned by the defendants, who were police officers, and who acted without a warrant. The only question of law raised in the case was whether the burden of proof was on the plaintiff to show that the arrest and imprisonment were not justified, by proving that the defendants did not have probable cause to believe the plaintiff guilty of a felony, or whether the burden was on the defendants to justify their actions. This matter was clearly called to the attention of the judge by the counsel in their arguments, and, although no specific request for a ruling was made, we are of opinion that, if the judge ruled incorrectly on the question of the burden of proof, the plaintiff had a right, at the close of the charge, to call the attention of the judge to the matter, and save an exception. The jury were instructed that the burden of proof, by a fair preponderance of the evidence, was upon the plaintiff to show that "the defendants did not have, at the time of the arrest and imprisonment, probable cause to believe that the plaintiff was guilty of a felony." We are of opinion that this instruction was wrong, and that the jury should have been instructed in accordance with the plaintiff's contention.

It was long ago said by Lord MANSFIELD: "A jailer, if he has a prisoner in custody, is *prima facie* guilty of an imprisonment; and therefore must justify." Badkin v. Powell, Cowp. 476, 478. So, in Holroyd v. Doncaster, 11 Moore, 440, and 3 Bing. 492, it was

[1] In Emmett v. Lyne, 1 Bos. & P. 255, (1805), the court said: that it was absurd to contend that every imprisonment included a battery, and that all that was said in Co. Litt. 253, which was cited in support of that proposition in Bull. N. P., was, that "imprisonment is a corporal damage."

said by Chief Justice BEST: "Where a man deprives another of his liberty, the injured party is entitled to maintain an action for false imprisonment, and it is for the defendant to justify his proceeding by showing that he had legal authority for doing that which he had done." The precise point involved in this case was decided in favor of the plaintiff's contention in Bassett v. Porter, 10 Cush. 418, in which it was said by Mr. Justice METCALF, in delivering the opinion of the court: "Every imprisonment of a man is *prima facie* a trespass, and, in an action to recover damages therefor, if the imprisonment is proved or admitted, the burden of justifying it is on the defendant." This case has not been overruled or questioned in this commonwealth. The same rule prevails in an action for an assault. If the assault is admitted or proved, the burden is on the defendant to prove justification. St. John v. Railroad Co., 1 Allen, 544; Blake v. Damon, 103 Mass. 199; Hathaway v. Hatchard, 160 Mass. 296, 35 N. E. 857; Lambert v. Robinson, 162 Mass. 34, 37 N. E. 753.[1]

O'SHAUGHNESSY v. BAXTER.

(121 Mass. 515.—1877.)

GRAY, Ch. J. This is an action of tort against a constable of Boston for an assault and false imprisonment. The material facts of the case, as they appear from the statements in the report and the findings of the jury, are as follows: This plaintiff, whose real name is John O'Shaughnessy, was sued by the name of John Shaughnessy, a name by which he was commonly known, upon a promissory note signed by another person of that name, and not by himself. The person who made the writ knew that the plaintiff was not the person who signed the note, but intended to have the writ served upon him, and it was served upon him by another constable, and entered in the court having jurisdiction thereof, which

[1] The learned judge then explained several cases, cited by the defendants, as actions for malicious prosecution, in which the courts properly ruled that the plaintiff must, undoubtedly, prove his case, a material averment of which is that the prosecution was commenced without reasonable and probable cause; and the proof of this, though a negative proposition, lies on the plaintiff.

rendered judgment, upon his default, for the plaintiff in that action, and issued execution accordingly, in due form of law. The execution, with the proper certificates, was delivered to this defendant, with instructions to take this plaintiff and commit him to jail. The defendant did so, in obedience to such instructions, and in good faith, after ascertaining that the original writ had been served upon the plaintiff, but knowing that he was not the person who signed the note upon which the action was brought.

On this state of facts, the plaintiff, being the party against whom the writ was intended to be made, and on whom it was actually served, was the party defendant therein, and the person against whom the judgment was rendered, and the execution issued. Whatever remedies he might have to relieve him from the judgment and execution as obtained by fraud, or to recover damages against the person who fraudulently abused the process of the court, the officer, acting in good faith, had the right to rely for his protection upon the process put into his hands, and was not bound to go behind that process, and to assume the risk of determining the question whether the plaintiff really signed the note upon which the action was brought, or the truth of any extrinsic fact which would exempt him from being arrested or imprisoned upon the execution. Laroche v. Wasbrough, 2 T. R. 137, 739; Magnay v. Burt, 5 Q. B. 381; S. C. Dav. & Meriv. 652; Wilmarth v. Burt, 7 Met. 257; Twitchell v. Shaw, 10 Cush. 46; Underwood v. Robinson, 106 Mass. 296, and other cases here cited. In the words of Chief Justice PARKER, "The difficulty in such cases is, to ascertain whether the judgment was or was not, in fact, rendered against the person who is taken in execution; for if it was, although the person was mistaken, yet the officer would be justified." Hallowell & Augusta Bank v. Howard, 14 Mass. 181, 183.

The fact that this plaintiff was commonly known by the name by which he was sued and arrested, distinguishes the case from those in which one man has been arrested upon a writ against another of a different name. See Cole v. Hindson, 6 T. R. 234; Finch v. Cocken, 5 Tyrwh. 774, 785; S. C. 3 Dowl. 678, 686; Griswold v. Sedgwick, 1 Wend. 126, 132; Langmaid v. Puffer, 7 Gray, 378.

Judgment on the verdict for the plaintiff.

MARKS v. TOWNSEND.

(97 N. Y. 590.—1885.)

EARL, J. The plaintiff was also properly nonsuited as to his cause of action for false imprisonment. The act (c. 300 of the Laws of 1831) under which the warrant was issued in November, 1878, was not repealed until May 10, 1880. Chap. 245, Laws of 1880. The facts stated in the affidavit upon which the warrant was issued were sufficient to give the judge who issued it jurisdiction; and in issuing it he acted judicially and made a judicial determination. The warrant was not, therefore, void or voidable or irregular. It was the result of the regular judicial action of a judicial officer having jurisdiction upon the facts presented to him to issue it. It was subsequently set aside by the judge who issued it, when a new fact, to wit, that the plaintiff had been before arrested in an action against him by these defendants, upon an order of arrest issued in the action for the same cause, and upon substantially the same grounds, was brought to his attention. The existence of this fact did not make the warrant void or irregular. When brought to his attention it furnished the judge a ground for the dismissal of the warrant in the exercise of further judicial action. It matters not whether the warrant was dismissed in the exercise of judicial discretion or upon the claim by the plaintiff that he could not be twice arrested for the same cause, and hence that he had the absolute legal right to be discharged from the second arrest; it was at most a case where the plaintiff was erroneously arrested. An error was committed, which upon a proper presentation of the facts was to be corrected by further judicial action. A warrant, granted under such circumstances, protects against an action for false imprisonment, not only the judge who granted it, but the party who procured it and instigated its service. The case stands no different from what it would have been if the plaintiff had appeared and denied the facts alleged in the affidavit upon which the warrant was based, and had thus procured his discharge upon the merits, or if the defendants, when they applied for the warrant, had disclosed the fact of the prior arrest, and the judge had erroneously decided that they were yet entitled to it, and his decision had upon appeal been reversed; or if when the fact of the prior arrest was afterward

brought to his attention, he had refused to set aside the warrant, and his decision had upon appeal been reversed. If the warrant of attachment or an order of arrest is issued in an action upon facts giving the judge jurisdiction and the defendant appears, and by showing new facts, or denying those alleged against him, procures the attachment or the order to be set aside, the process is not void or voidable, or irregular, but simply erroneous, and protects the judge and the party who procures it, although it is set aside, against an action for trespass or false imprisonment. In all such cases these are regular judicial methods, and that which was legally done at the time cannot be converted into a wrong by relation after the process has by judicial action been set aside. This rule of exemption is founded in public policy, and is applicable alike to civil and criminal remedies and proceedings, that parties may be induced freely to resort to the courts and judicial officers for the enforcement of their rights and the remedy of their grievances without the risk of undue punishment for their own ignorance of the law or for the errors of courts and judicial officers. The remedy of the party unjustly arrested or imprisoned is by the recovery of costs which may be awarded to him, or the redress which some statute may give him, or by an action for malicious prosecution, in case the prosecution against him has been from unworthy motives and without probable cause.

Even malicious motives and the absence of probable cause do not give a party arrested an action for false imprisonment. They may aggravate his damage, but have nothing whatever to do with the cause of action. Hence if in this case the defendants had intentionally withheld from the judge who granted the warrant the fact of the plaintiff's prior arrest, that fact would have been quite pertinent to maintain an action for malicious prosecution, but would not have laid the foundation for a recovery in an action for false imprisonment.

We have carefully examined many authorities, and have not found one which decides that in a case like this an action for false imprisonment can be maintained. They all sustain the views above expressed. Williams v. Smith, 14 C. B. (N. S.) 596; Hayden v. Shed, 11 Mass. 500; Reynolds v. Corp, 3 Caines, 268; McGuinty v. Herrick, 5 Wend. 240; Chapman v. Dyett, 11 id. 31; Deyo v. Van Vakenburgh, 5 Hill, 242; Landt v. Hilts, 19 Barb. 283; Simpson v. Hornbeck, 3 Lans. 52; Miller v. Adams, 7 id. 131; affirmed, 52 N.

Y. 409; Palmer v. Foley, 71 id. 106; Dusenburg v. Keiley, 35 id. 383; Day v. Bach. 87 id. 56.

* * * * *

Judgment affirmed.[1]

CAMPBELL v. SHERMAN.

(35 Wis. 103.—1874.)

Action for the unlawful seizure and conversion by the defendant, sheriff of Eau Claire County, of plaintiff's steamboat with its tackle and furniture.

COLE, J. The able and ingenious counsel for the defendant did not seriously contend that ch. 184, Laws of 1869, so far as it attempted to authorize a proceeding *in rem* against a vessel for the enforcement of a maritime contract, could be sustained as a valid enactment. The decisions of the Supreme Court of the United States are too clear and emphatic upon that question to allow any discussion, unless their binding authority is denied—a position not assumed in the argument. (Cases cited.) In view of these various adjudications, it is idle to argue in favor of the proposition that the State Legislature has authority to create maritime liens, or the power to confer upon a State court jurisdiction to enforce such a lien by a proceeding *in rem* against the vessel according to the practice in admiralty. That a proceeding against a vessel to enforce a contract for pilot's wages is a subject of admiralty jurisdiction, and partakes of all the incidents of a suit in admiralty, is equally well settled. It therefore results from these propositions of law, that the Circuit Court which issued the warrant commanding the

[1] A person who does no more than enter a complaint with a magistrate, who thereupon without jurisdiction issues a warrant, is not liable for false imprisonment. Langford v. B. & A. Ry., 144 Mass. 431; and cases in 54 Am. Dec. 265, n. But even judicial officers are liable for false imprisonment, when they issue an order of arrest and procure its enforcement, without color of legal authority or jurisdiction. Stephens v. Wilson 115 Ky. 27, 72 S. W. 336, (1903), where three justices of the peace, being a minority of fiscal court, attempted to enforce the attendance of another justice by issuing a warrant for his arrest, though there was no statute authorizing such action on their part.

sheriff to seize and safely keep the steamer *Ida Campbell* to answer any lien which should be established against the boat in favor of the plaintiff in that action for pilot's wages, had no jurisdiction of the cause, and its process was void. It gives no strength to the position of defendant's counsel, nor does it aid the discussion, to say that the Circuit Court is a court of general jurisdiction, when it is conceded that it has no jurisdiction over a proceeding exclusively vested in the courts of the United States. For as to the subject-matter of such a suit, it had no jurisdiction whatever, and the act of the Legislature clothed the court with no power to try and determine it. The party might, of course, have brought his action in the Circuit Court to enforce a common-law remedy; but when he resorted to it to enforce a maritime lien by a proceeding *in rem*, the court had no jurisdiction of the cause.

This being the case, the further question arises, Did the warrant thus issued in a cause over which that court had no jurisdiction, afford any protection to the officer for acts done in its execution? The counsel for the defendant contends that it would protect the officer, and that, if fair and regular on its face, he had no right and it was not his duty to inquire whether the court which issued it had jurisdiction of the cause. Where the subject-matter of the suit is within the jurisdiction of the court, yet jurisdiction in the particular case is wanting, there is certainly reason and authority for holding that an officer who executes a process fair upon its face, shall be protected. But a clear distinction exists between that case and a proceeding in which the process itself shows that the court had exceeded its jurisdiction. The rule is stated by Mr Justice SMITH in Bagnall v. Ableman, (4 Wis. 163,) in the following language: "When the process is fair on its face, and issued by a court or magistrate of competent jurisdiction, it is a protection to the officer. But if it be not fair and regular upon its face, or its recitals or commands show a want or excess of jurisdiction in the court or magistrate issuing it, the officer is not protected in its execution." p. 179. The form of the warrant issued in the present case is not set forth in the answer. But it was undoubtedly such a process as the clerk was required to issue upon the filing of the complaint, and it would show upon its face that it was issued in a proceeding instituted under the provisions of ch. 184. It would command the officer to attach and seize the steamer *Ida Campbell*, her tackle, apparel and furniture, if found within his county, and safely keep the same to

answer all such liens as should be established against it in favor of the plaintiff in the cause. It would properly contain recital showing that a complaint had been filed with the clerk, and state the nature and amount of the demand for which a lien was claimed against the vessel. We must presume from the matters stated in the answer, that such was the form of the warrant under which the officer acted; and furthermore a process setting forth these facts would be required by the law under which the proceeding was taken. And it is very apparent that such a warrant would show upon its face the nature of the proceeding, and that the suit was instituted to enforce a maritime lien. In other words, it would show that the Circuit Court had no jurisdiction of the subject-matter of the action, and no power to hear and determine it. And we understand the rule to be, that where the process does thus show a want of jurisdiction in the court of the subject-matter of the action, it is void, and does not protect the officer. In this all the cases agree.

But it is said that this rule imposed upon the officer in the present case the duty of determining, in advance of any decision of the courts of this State, the validity of an act of the Legislature. How can it be expected, it is asked, that a mere ministerial officer could decide such a question, and thus find out that his process was void for want of jurisdiction in the court which issued it? The maxim *Ignorantia juris non excusat*—ignorance of the law, which every man is presumed to know, does not afford excuse—in its application to human affairs, frequently operates harshly; and yet it is manifest that if ignorance of the law were a ground of exemption, the administration of justice would be arrested, and society could not exist. For in every case ignorance of the law would be alleged. And consequently the answer must be given in this case, that the ignorance of the officer is of the law, and the rule is almost without an exception, that this does not excuse. It may devolve upon the officer a vast responsibility in some cases, to say that he must notice at his peril that an act of the Legislature attempting to confer jurisdiction upon the courts is unconstitutional. But if the officer does not wish to assume all the hazard which such a rule of law imposes on him, he must require a bond of indemnity from the party for whom he is acting. It is further said that it was the duty of the officer to obey the mandate of the warrant and seize the identical steamboat which he did attach, and that he had no alternative but to obey. If the act which the writ commanded him to do was a

trespass, he was not required to perform it. Nor would he be liable in that case to the plaintiff for refusing to execute a process void for want of jurisdiction.[1]

PALMER v. MAINE CENT. R. CO.

(92 Me. 399; 42 At. 800.—1899.)

SAVAGE, J. Trespass for false imprisonment. The verdict was for the plaintiff for $550. * * * The precise question to be decided, therefore, is whether a private individual who has procured the arrest of an innocent person for a misdemeanor, by an officer without a warrant, can justify by showing that he acted in good faith, without malice, and upon a belief of guilt founded upon reasonable grounds. We think the question must be answered in the negative. This is a suit, not for a malicious prosecution, but for a false imprisonment. It is not for a misuse or an abuse of legal process, but for an arrest without legal process. The action must be sustained, unless the defendant can show a legal justification for causing the arrest to be made.

The principles which, by the common law, regulate the right to arrest, or cause an arrest, without warrant, have been long settled both in this country and England; and, by these principles, the rights of these parties must be determined. Unless modified by statute, they are recognized by the courts, almost without exception. They are designed to promote the safety of the public, and the due administration of public justice, on the one hand, and, on the other, to afford the citizen security against unwarrantable restraints upon his personal liberty. We shall state these principles somewhat more fully, perhaps, than the particular question under consideration requires; but a full statement is valuable by way of illustration, and for the purpose of showing the clear distinction between the powers of an officer and those of a private individual.

By the common law, an officer may arrest for felony, without warrant, upon reasonable grounds of suspicion. 2 Add. Torts, §

[1] *Cf.* Buck v. Colbath, 3 Wall. 334; Elder v. Morrison, 10 Wend. 128; Firestone v. Rice, 71 Mich. 377; Tillman v. Beard, Mich 475, 80 N. W. 248; Roth v. Shupp, 94 Md. 55, 50 At. 430; Stephens v. Wilson, 115 Ky. 27, 72 S. W. 336.

802; Samuel v. Payne, 1 Doug. 360: Davis v. Russell, 5 Bing. 354; 1 Hale, P. C. 567; Burke v. Bell, 36 Me. 317; Rohan v. Sawin, 5 Cush. 281; Holley v. Mix, 3 Wend. 350; Com. v. Carey, 12 Cush. 246; Wills v. Jordan (R. I.) 41 Atl. 233; Doering v. State, 49 Ind. 56; Eanes v. State, 6 Humph. 53; Kurtz v. Moffitt, 115 U. S. 487, 6 Sup. Ct. 148; Holden v. Hall, 4 Hurl. & N. 423. And, for making such an arrest, the officer is justified, although it turns out that no felony has, in fact, been committed. Beckwith v. Philby, 6 Barn. & C. 635; Simmons v. Vandyke, 138 Ind. 380, 37 N. E. 973, and the cases cited above. But an officer may not arrest on information or suspicion, without a warrant, for a misdemeanor, unless it was committed in his presence. 2 Add. Torts, § 804; 4 Bl. Comm. 292; 1 Hale, P. C. 567; People v. McLean, 68 Mich. 480, 36 N. W. 231; Kurtz v. Moffitt, *supra;* Ross v. Leggett, 61 Mich. 445, 28 N. W. 695; Com. v. Ruggles, 6 Allen, 588; Com. v. McLaughlin, 12 Cush. 615; State v. Lewis, 50 Ohio St. 179, 33 N. E. 405; Paw v. Becknel, 3 Ind. 475; Webb v. State, 51 N. J. Law, 189, 17 Atl. 113; Krulevitz v. Railroad Co., 143 Mass. 228, 9 N. E. 613. In the last-named case, the plaintiff had been arrested, at the request of a conductor, by an officer, without a warrant, for a refusal to pay fare. We have cited these cases *in extenso,* because nearly all of these contain valuable discussions of this subject. In many of these cases it seems to have been held that the authority of an officer to arrest for misdemeanor, without warrant, is limited to breaches of the peace or affrays, committed in his presence; see, also, Com. v. Wright, 158 Mass. 149, 33 N. E. 82, though the offense has actually been committed, but elsewhere, Scott v. Eldridge, 154 Mass. 25, 27 N. E. 677. But in still other cases the authority is extended to all crimes committed in the presence of the officer. Railroad Co. v. Cain (Md.) 31 Atl. 801, and cases cited there.

But the authority of a private individual is much more limited and confined. He may arrest for felony, but he does it at his peril. If called upon to justify, it has been held by some courts that he must show that the felony had actually been committed, and that he had reasonable grounds for believing the person arrested to be guilty. Wakely v. Hart, 6 Bin. 316; Davis v. Russell, *supra;* Allen v. Wright, 8 Car. & P. 522; Reuck v. McGregor, 32 N. J. Law, 70; Holley v. Mix, 3 Wend. 350; Keenan v. State, 8 Wis. 132; Beckwith v. Philby, *supra;* Russell v. Shuster, 8 Watts & S. 308; Burns v. Erben, 40 N. Y. 463; 2 Add. Torts, § 803; Cooley, Torts (2d

Ed.) 202. But it has been held by other courts, and perhaps with better reason, that he must show that the person arrested was actually guilty of the felony. Rohan v. Sawin, 5 Cush. 281; Com. v. Carey, 12 Cush. 246; Morley v. Chase, 143 Mass. 396, 9 N. E. 767. So, he may arrest for an affray or a breach of the peace committed in his presence, and while it is continuing. 1 Russ. Crimes, 272; 1 Archb. Cr. Prac. & Pl. 82; Timothy v. Simpson, 1 Cromp. M & R. 757; Knot v. Gay, 1 Root, 66; Mayo v. Wilson, 1 N. H. 53; Phillips v. Trull, 11 Johns. 486; Kurtz v. Moffitt, *supra;* Ross v. Leggett, *supra.* But a private individual may not arrest for misdemeanor, on suspicion, no matter how well grounded. And as, in case of felony, he is bound to show that the felony has been committed, so, in case of affray or breach of the peace committed in his presence, he must show that the party arrested by him was guilty. Nor can a private individual justify, if he procure the arrest of an innocent person for a misdemeanor, by an officer, without warrant. In such case he is answerable. He can no more lawfully cause such an arrest than he can make it himself. Hobbs v. Branscomb, 3 Camp. 420; Hopkins v. Crowe, 7 Car. & P. 373; Derecourt v. Corbishley, 5 El. & Bl. 188; Price v. Seeley, 10 Clark & F. 28; Collett v. Foster, 2 Hurl & N. 356; Veneman v. Jones, 118 Ind. 41, 20 N. E. 644; Holley v. Mix, 3 Wend. 350; Samuel v. Payne, 1 Doug. 360. In Railroad Co. v. Cain, *supra,* a case analogous in some respects to the one at bar, the plaintiff, by the procurement of the conductor, was arrested as he left the train, by an officer, without warrant. The charge was disorderly conduct on the train. The railroad company was permitted to justify by showing that the charge was true in fact, and that the disorderly conduct amounted to a breach of the peace, for which the conductor, as a private individual, would have been authorized to arrest had he been physically able to do so. The court said that "the act of the conductor in telegraphing for a policeman, and in a short space of time thereafter turning the plaintiff over to the officer, was in no respect different from a formal arrest by the conductor in the midst of the riot and disorder." In the case at bar, however, the charge was not true, and herein lies one distinction at least, and a vital one. Furthermore, the alleged offense here was not a breach of the peace.

Rev. St. c. 133, § 4, provides that every officer shall arrest and detain persons found violating any law of the state until a legal warrant can be obtained. But this statute does not aid the de-

fendant. The plaintiff was not found violating any law of the state. The constable had no lawful authority to arrest him for a misdemeanor of which he was not guilty, on information merely, without a warrant.

We conclude, therefore, that the arrest of the plaintiff was unlawful. And, as already intimated, this conclusion disposes of the first two of the defendant's exceptions; for, assuming that the conductor had a right, as a matter of law, to make the inquiry he did, as a means of identification, and assuming that, by the plaintiff's conduct, the conductor had reason to believe, and did believe, that the plaintiff was fraudulently evading the payment of his fare, still, as we have seen, all this would have afforded no justification, in law.

WEST v. CABELL.

(153 U. S. 78.—1894.)

GRAY, J. This was an action upon a marshal's bond, in the usual form, the condition of which was that the marshal, by himself and his deputies, should faithfully perform all the duties of his office, and upon which any person injured by a breach of the condition might maintain an action. Rev. St. §§ 783, 784; Lammon v. Feusier, 111 U. S. 17; 4 Sup. Ct. 286. The breach relied on by Vandy M. West, the plaintiff in this case, was his arrest, against his protest, by a deputy of the marshal, under a warrant issued by a commissioner, commanding the arrest of James West, and not otherwise designating or describing the person to be arrested, upon a complaint of the deputy marshal charging James West with the murder of John Cameron. The defense was that the arrest of the plaintiff under that warrant was lawful. At the trial it appeared that the plaintiff had never been known or called by the name of James West, or by any other name than his own; notwithstanding which, the court, against the objections and exceptions of the plaintiff, admitted oral testimony of the commissioner and of the deputy marshal that the warrant was issued and intended for the arrest of the plaintiff, and instructed the jury that, if they believed that the plaintiff was the man for whose arrest the commissioner issued the

warrant, the defendants were not liable for damages on account of the mere fact of arrest.

By the common law, a warrant for the arrest of a person charged with crime must truly name him, or describe him sufficiently to identify him. If it does not, the officer making the arrest is liable to an action for false imprisonment; and if, in attempting to make the arrest, the officer is killed, this is only manslaughter in the person whose liberty is invaded. 1 Hale, P. C. 577, 580; 2 Hale, P. C. 112, 114; Fost. Crown Law, 312; 1 East, P. C. 310; 1 Chit. Cr. Law, 39, 40; Huckle v. Money, 2 Wils. 205; Money v. Leach, 3 Burrows, 1742, 1766, 1767, 1 W. Bl. 555, 561, 562; Rex v. Hood, 1 Moody, Crown Cas. 281; Hoye v. Bush, 1 Man. & G. 775, 2 Scott, N. R. 86. Likewise, a warrant of arrest in a civil action, which does not name or describe the person to be arrested, is no justification of the officer. Code v. Hinson, 6 Term R. 234; Shadgett v. Clipson, 8 East, 328; Finch v. Cocken, 2 Comp. M. & R. 196, 1 Gale, 130, and 3 Dowl. 678; Kelly v. Lawrence, 3 Hurl. & C. 1.

The principle of the common law, by which warrants of arrest, in cases criminal or civil, must specifically name or describe the person to be arrested, has been affirmed in the American constitutions; and by the great weight of authority in this country, a warrant that does not do so will not justify the officer in making the arrest. Co. v. Crotty, 10 Allen, 403; Griswold v. Sedgwick, 6 Cow. 456, 1 Wend. 126; Mead v. Haws, 7 Cow. 332; Holley v. Mix, 3 Wend. 350, 354; Scott v. Ely, 4 Wend. 555; Gurnsey v. Lovell, 9 Wend. 319; Melvin v. Fisher, 8 N. H. 407; Clark v. Bragdon, 37 N. H. 562, 565; Johnston v. Riley, 13 Ga. 97, 137; Scheer v. Keown, 29 Wis. 586; Rafferty v. People, 69 Ill. 111.

In Com. v. Crotty, for instance, in which Morris Crotty and others were indicted and convicted for a riot in resisting the arrest of Crotty upon a warrant commanding the arrest of "John Doe or Richard Roe, whose other or true name is to your complainant unknown," the conviction was set aside by the Supreme Judicial Court of Massachusetts, upon the grounds that the warrant was insufficient, illegal and void, because it did not contain Crotty's name, nor any description or designation by which he could be known and identified as the person against whom it was issued, and was, in effect, a general warrant, upon which any other person might as well have been arrested, as being included in the description; and that: "The warrant being defective and void on its face, the officer

had no right to arrest the person on whom he attempted to serve it. He acted without warrant, and was a trespasser. The defendant whom he sought to arrest had a right to resist by force, using no more than was necessary to resist the unlawful acts of the officer. An officer who acts under a void precept, and a person doing the same act who is not an officer, stand on the same footing; and any third person may lawfully interfere to prevent an arrest under a void warrant, doing no more than is necessary for that purpose." 10 Allen, 404, 405.

The fourth article of amendment of the Constitution of the United States declares that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The provision of section 1014 of the Revised Statutes, which authorizes an offender against the laws of the United States to be arrested and imprisoned or bailed by a judge of the United States or a commissioner of the Circuit Court in any State where the offender may be found, "and agreeably to the usual mode of process against offenders in such State," is necessarily subordinate to the declaration of the Constitution that all warrants must particularly describe the person to be seized.

In the case at bar, the effect of the rulings and instructions of the court was to give the jury to understand that the private intention of the magistrate was a sufficient substitute for the constitutional requirement of a particular description in the warrant. For this reason the judgment is reversed, and the case remanded, with directions to set aside the verdict, and to order a new trial.

LOOK v. DEAN.
LOOK v. CHOATE.

(108 Mass. 116.—1871.)

The first case was an action of tort for unlawfully arresting and imprisoning the defendant on two occasions.

CHAPMAN, C. J. The question which this case presents arises

upon the defendant's request for instructions, and the instructions that were actually given. The defendant asked the court to rule that if the plaintiff was insane and the defendant, honestly believing that the welfare of the plaintiff demanded that he should go from the crowd to which he was talking to a place of quiet near by, took him forcibly to such place, using no more force than was necessary for the purpose, and acting from no other motive than a desire to assist and protect the plaintiff, such act would not be an assault nor an unlawful arrest or imprisonment. The court declined to give this instruction, but instructed the jury that, if the plaintiff was insane, the officer had a right to arrest him, but it would in such case be his duty immediately to take proper steps to have him committed to a lunatic hospital, and if he failed to do so he would be liable from the beginning for the arrest. Both the request and the instructions assume that he was neither dangerously insane, nor disturbing the peace, but was merely insane. The defendant was a deputy of the State constable, but his office gave him no authority over the plaintiff. He had only such authority as any private person would have. The right which every citizen has to enjoy personal liberty is necessarily subject to some exceptions. Most of these exceptions are enumerated in Colby v. Jackson, 12 N. H. 526, and the authorities there cited. Among them, are the right to restrain a person who is fighting, or doing mischief, or disturbing a congregation, or has fallen in a fit, or is so sick as to be helpless, or is unconsciously going into great danger, or is drunk, or has delirium tremens, or is so insane as to be dangerous to himself or others. In such cases, the right to restrain persons has its foundation in a reasonable necessity, and ceases with the necessity. As to insane persons who are not dangerous, they are not liable to be thus arrested or restrained by strangers. Bac. Ab., Trespass, D; Anderdon v. Burrows, 4 C. & P. 210; Scott v. Wakem, 3 Fost. & Finl. 328; Fletcher v. Fletcher, 28 L. J. N. S. (Q. B.) 134; In re Oakes, 8 Law Reporter, 122. There is no reason why they should be thus liable; for it is well known that many persons who are insane, and especially monomaniacs, are as harmless as any other persons, and are not deemed proper subjects for treatment in a hospital. The request for instructions was properly refused.

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The second case was an action of tort brought in this court by the same plaintiff against the superintendent of the Taunton Lunatic

Hospital for unlawfully confiding the plaintiff there during two days.

CHAPMAN, C. J. The defendant was superintendent of the insane hospital at Taunton, and had authority to receive all persons who were legally brought as patients to that institution. The plaintiff was brought there on Saturday, August 21, 1869, by Robert Crossman, a deputy State constable, on a complaint made by Crossman, and directed to the judge of probate for the country of Bristol, on the day previous, stating that the plaintiff was an insane person and a proper subject for treatment and custody in a State lunatic hospital. One of the selectmen of Rochester, the place of the plaintiff's residence, had in writing acknowledged notice of the complaint and application; and two physicians had signed and sworn to a certificate that within one week previous to the date of the complaint they had made a personal examination of the plaintiff, and after due inquiry and personal examination they were satisfied that he was a fit subject for remedial treatment at the hospital. But it omitted to state that he was insane, and thus failed to be such a certificate as is required by the Stats. of 1862, c. 223, §§ 3, 8, and 1865, c. 268, § 1. The officer took these papers with him to the hospital, but had no warrant. The excuse offered is, that the judge of probate for Bristol, and also the judge of probate for Plymouth, were both absent from the county, and no warrant could be obtained. Crossman desired to leave the plaintiff at the hospital until the following Monday, for the purpose and with the intention to procure the other papers usual in such cases. The assistant superintendent received the plaintiff, believing him to be a fit subject for hospital treatment, and kept him confined till Monday, August 23, when his friends came and took him away. He was within the meaning of the law an insane person, and a proper subject for treatment in the hospital, though not dangerous to himself or the community. The truth of these statements is admitted by the demurrer. The notice issued by the judge of probate on August 28 is immaterial, for it could not have any application to the imprisonment complained of. We look in vain in the statutes for any authority in Crossman to take the plaintiff to the hospital, or to arrest him, without a warrant, even though his purpose was to detain him till he could carry him before the judge of probate, and procure a warrant, as soon as the judge should return home, the plaintiff not being dangerous

either to himself or others. The statutes give no authority to arrest harmless persons without a warrant, even for the purpose of bringing them before the judge of probate. And were it otherwise the officer has abandoned all proceedings under the statutes. Being a mere stranger to the plaintiff, and abandoning the arrest without making any return he had not even the rights that a relative or friend would have. He brought the plaintiff to the hospital tortiously, and no authority could be derived from him for the plaintiff's detention. As the plaintiff was not detained by virtue of the statutes or by any power derived from the common law, all persons concerned in the detention are wrongdoers.

The kindness with which the plaintiff was treated, and the good motives which dictated his detention, should affect the question of damages, but cannot affect his legal right to his personal liberty. He has a right of action against any and all persons who have been concerned in depriving him of it without legal authority. Though the defendant was absent when the plaintiff was brought to the hospital, yet the plea does not state that he was not afterwards present and consenting to the detention till Monday, when the plaintiff's friends came and took him away.

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§ 8.—MALICIOUS PROSECUTION.

PORTER v. MACK.

(50 W. Va. 581; 40 S. E. 469.—1901.)

DENT, J. John M. Mack and Greenberry B. Boren, defendants, feeling aggrieved by the judgment of the circuit court of Hancock county against them in favor of John Porter for the sum of $18,333, assign 354 reasons why such judgment should not be permitted to stand. * * * *

Notwithstanding the defectiveness of the declaration, the defendants insist that the court should proceed to consider the 353 other errors assigned, until at least, if possible, one can be found that is a complete bar to the suit. This is a case that is entirely too much litigated. When Greek meets Greek, then comes the tug of war. Sparks, feathers, and dust are made to fly; but little blood is shed,

m a vast amount of escaping steam the court must distill the xir of the law. * * * *

ndant's next plea in bar is the statute of limitations. If the ous charges had been well declared on as a ground of the there is no question but that the statute could have been in bar thereof. A conspiracy charged could not have pre- the bar of the statute to any of the several grounds of any more than if they had been declared on separately. This on, being for consequential and vindictive damages founded on malice, while it asserts damages to business and property, is still a mere personal action that does not survive to a personal representative, and therefore is subject to the bar of the statute of limitations relating to personal actions, being one year from the time the action accrues. In the case of Noonan v. Orton, 34 Wis. 259, 17 Am. Rep. 441, it is said that "an action for a malicious prosecution or a malicious abuse of legal process is an action for a personal injury, although special loss to plaintiff's business resulting from such wrong may be alleged to aggravate the damages." On page 263, 34 Wis., and page 443, 17 Am. Rep., LYON, J., says: "A libel or a slander might deprive a man of employment, destroy his credit, ruin his business, and greatly impair his estate. Yet an action therefor would be an action for a personal injury; the effect of the wrong on the estate of the injured party being merely incidental. So in this case. The personal injury is the *gravamen* of the action, and the effect of the alleged malicious acts of the defendant upon the estate of the plaintiff is incidental merely. Such an effect is an element to be considered in assessing damages, but does not and cannot change the character of the action." Neither conspiracy nor consequential or special damages to business or property can change the nature of a personal action, so as to prevent the bar of the statute of limitations. When the legislature enacted section 20, c. 85, Code, to wit, "An action of trespass or trespass on the case may be maintained by or against the personal representative for the taking or carrying away of any goods, or for the waste or destruction of or damage to any estate of or by his decedent," it did not intend to provide that suits for slander, libel, assault and battery, false imprisonment, malicious prosecution, and other like personal actions, should lose their specific character by the allegation of conspiracy and specific or consequential damages to business and property. If it did, then there are no purely personal actions left; for it is easy

enough to make these allegations in all such suits, and in most of them furnish proof of consequential or indirect damages to person or business. The damage to estate the legislature had in view was the direct damage occasioned by overt or negligent acts in relation to such estate, and not indirect and consequential damages arising out of injury to person or reputation. The action for malicious prosecution is in tort for the injury, not to property, but to the person, and seeks the recovery of consequential and punitive damages. 14 Am. & Eng. Enc. Law, 37; 13 Am. & Eng. Enc. Pl. & Prac. 426; Lawrence v. Martin, 22 Cal. 174; Francis v. Burnett, 84 Ky. 23; Nettleton v. Dinehart, 5 Cush. 543; 19 Am. & Eng. Enc. Law (2d Ed.) 650. * * * *

FRISBIE v. MORRIS.

(75 Conn. 637; 55 At. 9.—1903.)

TORRANCE, C. J. The statute (Gen. St. 1902, § 1105) provides, in substance, that if any person shall commence and prosecute any suit or complaint against another "without probable cause, and with a malicious intent to unjustly vex and trouble him, he shall pay him treble damages." * * * *

An action brought under our statute for the malicious prosecution of a civil suit "is subject to the same general principles as are actions on the case, for malicious prosecutions at common law." Goodspeed v. East Haddam Bank, 22 Conn. 530, 535, 58 Am. Dec. 439. In actions for malicious prosecutions and in actions under our statute for vexatious suit, two of the essential allegations are (1) that no probable cause existed for instituting the prosecution or suit complained of; and (2) that such prosecution or suit terminated in some way favorably to the defendant therein. 1 Swift's Digest, pp. 491, 494, 647; Munson v. Wickwire, 21 Conn. 513, 515; Wall v. Toomey, 52 Conn. 35; Thompson v. Beacon Valley Rubber Co., 56 Conn. 493, 16 Atl. 554. So long as the prosecution claimed to be malicious, or the suit claimed to be vexatious, is pending, "it cannot be known but that the party will be convicted upon it, or that it was commenced and carried on from motives of malice, without probable cause." 1 Swift's Digest, p. 491. In both actions, if it appears

that probable cause existed, the defendant will prevail, even though it also appear that he instituted the proceeding complained of maliciously. "Let there be ever so much malice, if there was probable cause, the prosecution was justifiable." 1 Swift's Digest, pp. 491, 492; Thompson v. Beacon Valley Rubber Co., 56 Conn. 493, 16 Atl. 554. "For maliciously prosecuting a good cause of action in the manner provided by law, * * * there is no remedy, because there is no wrong." Johnson v. Reed, 136 Mass. 421, 423. Moreover, if in the action for malicious prosecution or for vexatious suit it appears that the prosecution properly ended in a judgment of conviction, or that in the civil suit judgment was properly rendered against the defendant therein, such outstanding judgment is, as a general rule, conclusive evidence of the existence of probable cause for instituting the prosecution of the suit. "The conviction of the plaintiff is justly considered as conclusive evidence of probable cause." CARPENTER, J., in Brown v. Randall, 36 Conn. 56, 63, 4 Am. Rep. 35; Monroe v. Maples, 1 Root, 553; Goodrich v. Warner, 21 Conn. 432, 443; 19 Amer. & Eng. Ency. of Law (2d Ed.) pp. 667, 668, and cases cited.

Applying the foregoing principles to the case at bar, we think the trial court committed no error in overruling the demurrer, and in rendering judgment upon the motion. Upon the pleadings as they stood when the demurrer was overruled, and when the motion was granted, it conclusively appeared from the record that the proceeding of which the plaintiff complained had terminated in a valid outstanding judgment against him. It thus, in effect, conclusively appeared from the record that at least probable cause existed for the action of the selectmen of which the plaintiff complained, and therefore that the plaintiff had no cause of action.

There is no error. The other Judges concurring.[1]

[1] In Craig v. Ginn, 3 Penne. (Del.) 117, 48 At. 192, 94 Am. St. R. 77 (1901), the court said: "But the rule seems to be well settled that, where the termination of the prosecution has been brought about by the procurement of the party prosecuted, or by compromise and agreement of the parties, then an action for malicious prosecution cannot be maintained. McCormick v. Sisson, 7 Cow. 715; Welch v. Cheek, 115 N. C. 311, 20 S. E. 460; Langford v. Railroad Co., 144 Mass. 431, 11 N. E. 697; Marcus v. Bernstein, 117 N. C. 31, 23 S. E. 38; Atwood v. Beirine, 73 Hun, 547, 26 N. Y. Supp. 149; Clark v. Cleveland, 6 Hill, 344; Gallagher v. Stoddard, 47 Hun, 101; Wilkinson v. Howell, 1 Moody & M. 495; Brown v. Randall, 36 Conn. 56; Startwell v. Parker, 141 Mass. 405, 5 N. E. 807; Fadner v. Filer, 27 Ill. App. 506."

RIDER v. KITE.

(61 N. J. L. 8; 38 At. 754 (1897.)

MAGIE, C. J. The only question presented in this case is whether there was sufficient evidence that the prosecution which was claimed to be malicious had been terminated before the commencement of the action. If not, it was error to refuse the nonsuit, for nothing is better settled in this State than that such action cannot be maintained unless the prosecution complained of had been terminated before the commencement of the action. Potter v. Casterline, 41 N. J. Law, 22; Apgar v. Woolston, 43 N. J. Law, 58; Lowe v. Wartman, 47 N. J. Law, 413, 1 Atl. 489. The contention on the part of the plaintiff in error is that under our criminal procedure act, as amended, the discharge by the magistrate of an accused person upon examination does not terminate the prosecution, but that it remains pending until the grand jury has considered, or at least has had an opportunity to consider, the complaint by which the prosecution was commenced. It is not denied that prior to the adoption of the amendments to the criminal procedure act, to which our attention is called, such a discharge would have terminated the prosecution, so as to give a cause of action to the injured party if the prosecution was malicious.

Clearly, it would have been so; for such an action may be brought whenever the particular prosecution complained of has been ended, although the accused may still be liable to be called to answer for the same offense. The prerequisite is only that the particular prosecution be disposed of in such a manner that it cannot be reviewed, and the complainant, if he intends to proceed further, must institute proceedings *de novo*. Apgar v. Woolston, *ubi supra;* Clark v. Cleveland, 6 Hill, 344. When, upon a criminal complaint, an accused person is arrested, and brought before a magistrate, the latter, upon examination, may require the accused to enter into recognizance to abide the action of the grand jury, and, in default of such recognizance, commit him to jail for the same purpose, or he may dismiss the complaint and discharge the accused from custody. When the former course is pursued, it is obvious that the prosecution has not terminated, for the accused is either confined or under recognizance until the complaint whereon he was

arrested has been further considered. But when the latter course is taken, and the accused discharged, it is equally obvious that the particular prosecution is at an end; for although the complaining witness may voluntarily go before the grand jury, and charge the accused with the same offense, and an indictment may even be found, yet such prosecution would be a new one, commenced by the complainant before the grand jury, and not founded on the original complaint. Apgar v. Woolston, *ubi supra;* Fay v. O'Neill, 36 N. Y. [illegible] Robbins v. Robbins, 133 N. Y. 597, 30 N. E. 977; Moyle v. [illegible], 141 Mass. 238, 6 N. E. 520.[1]

AHRENS & OTT MFG. CO. v. HOEHER.

(106 Ky. 692; 51 S. W. 194 (1899.)

HOBSON, J. Appellee instituted this action against appellant to recover damages for an alleged malicious prosecution. The jury having found for him $5,000 damages, and the court having overruled appellant's motion for a new trial, it seeks by this appeal a reversal of the judgment against it for that amount. * * * * After telling the jury that appellant was not liable unless the prosecution was malicious, and without probable cause, the court thus defined malice: "The court instructs the jury that by the terms 'maliciously' and 'malice,' as used in these instructions, is meant the intentional doing of a wrongful act to the injury of another, without justification or legal excuse therefor." In Bish. Noncont. Law, § 231, the learned author says that the meaning of the word "malice" depends largely upon the subject to which it is applied, and that in a general way its meaning is as above defined. He then adds: "In the law of malicious prosecution it requires the mental condition or purpose, which judicial decision has made an indispensable element in the wrong. It is not a mere fiction of law, but it must be malice in fact. Taking these views for our guide, the malice in malicious prosecutions is not necessarily, while it may be, ill will to the individual; but it is any evil or unlawful purpose, as distinguished from that of promoting the justice of the law." The

[1] The court proceeded to show that legislation had not changed this rule and dismissed the certiorari.

same rule is laid down in Cooley Torts (1st Ed.) 185, where it is said that the motive must be improper or wrongful. Tested by this rule, the instruction quoted should not have been given. The court properly told the jury that malice might be inferred by them from the want of probable cause; but this is an inference that the jury may or may not make. The existence of malice is a question for the jury on all the facts and circumstances of the case, and the jury, from the definition of malice given them, may have understood that they must regard the prosecution to be malicious in law if without justification or legal excuse, although there was, in their judgment, no malice in fact.[1]

STEWART v. SONNEBORN.

(98 U. S. 187.—1878.)

Mr. Justice STRONG. The errors now assigned are exclusively to the charge given by the court to the jury. The instruction given was (*inter alia*) as follows: "But if they (the defendants) had no legal claim or demand against the complainant (Sonneborn), then, whether they had probable cause or not, they had no right to institute the proceedings (in bankruptcy). They cannot go back and allege that, though they had no legal claim against him, they thought they had; in other words, that they had probable cause to believe that they had such a demand. Unless they had a debt they cannot allege probable cause for proceeding in bankruptcy at all."

[1] In Navarino v. Dudrap, 66 N. J. L. 620, 50 At. 353 (1901); the court said: "Whether an action for malicious prosecution can be maintained where the facts sworn to by the defendant, upon which the warrant issued, did not constitute a crime, has been frequently the subject of judicial consideration. The distinction established by the cases is that where the affiant states the facts truly, and the judicial officer thereupon does an act which the law will not justify, the affiant is not liable, because in that case the grievance complained of arises from the mistake of the judge, and from no wrongful act of the affiant. But where the affiant falsely and maliciously states the facts untruly, and procures, as in this case, a warrant to be issued, he becomes responsible for the prosecution and arrest, because if he had not made the false affidavit, and asked for the issuing of a warrant, the judicial officer could not and would not have decided that criminal process should issue. The machinery of the criminal law is thereby put in operation by the act of the person who makes the affidavit."

"Their defense cannot stand on two probable causes, one on top of the other. * * * As it has been adjudicated by the Circuit Court of Barbour county, and affirmed by the State Supreme Court, that the defendants never had a legal claim against the plaintiff, and therefore had no right to institute proceedings in bankruptcy against him, the plaintiff is entitled to recover in this action the damages he has sustained by those unlawful proceedings. The court therefore rules that the defense in this case cannot be sustained by proving that the defendants had probable cause to believe that the plaintiff had committed an act of bankruptcy; but it being shown by judicial determination that they had no legal claim or debt against the plaintiff, and had, therefore, no right to institute bankruptcy proceedings, they are liable for the damages sustained by the plaintiff thereby, and the only question for the jury will be the amount of damages, under the circumstances of the case. * * * We charge you, therefore, that the plaintiff is entitled to recover his actual damage, or the loss he has actually sustained, at all events." * * * And again: "The actual damages sustained by the complainant, that you will give him a verdict for, at all events."

This construction, we think, was erroneous, and emphatically so, in view of the facts which appeared in evidence. It ignores totally the question whether the conduct of the defendants had been attended by malice, though the plaintiff's declaration charged malice, and it denied all importance to the necessary inquiry, whether they had probable cause for their action. More than this, it disregarded entirely evidence of facts which have been determined to be in law a perfect defense to an action for a malicious prosecution. The jury were positively instructed to return a verdict for the plaintiff independently of any consideration of malice in the institution of the bankruptcy proceedings, or want of probable cause therefor. If the charge was correct, then every man who brings a suit against another, with the most firm and reasonable belief that he has a just claim, and a lawful right to resort to the courts, is responsible in damages for the consequences of his action, if he happens to fail in his suit. His intentions may have been most honest, his purpose only to secure his own, in the only way in which the law permits it to be secured; he may have had no ill-feeling against his supposed debtor, and may have done nothing which the law forbids. Such is not the law. It is abundantly settled that no suit can be maintained against an unsuccessful plaintiff or prosecutor, unless it is

shown affirmatively that he was actuated in his conduct by malice, or some improper or sinister motive. Malice is essential to the maintenance of any such action, and not merely (as the Circuit Court thought) to the recovery of exemplary damages. Notwithstanding what has been said in some decisions of a distinction between actions for criminal prosecutions and civil suits, both classes at the present day require substantially the same essentials. Certainly an action for instituting a civil suit requires not less for its maintenance than an action for a malicious prosecution of a criminal proceeding. Nicholson v. Coghill, 4 Barn. & Cres. 21; Webb v. Hill, 3 Carr. & P. 485; Burhams v. Sanford, 19 Wend. (N. Y.) 417; Cotton v. Huidekoper, 2 Pa. 149.

In Farmer v. Darling, 4 Burr. 1791, one of the earliest reported cases, if not the earliest, Lord MANSFIELD instructed the jury that the "foundation of the action was malice," and all the judges concurred that "malice, either express or implied, and the want of probable cause, must both concur." From 1766 to the present day, such has been constantly held to be the law both in England and this country. (See a multitude of cases collected in Vol. 8, U. S. Digest, first series, 942, pt. 95.) And the existence of malice is always a question exclusively for the jury. It must be found by them, or the action cannot be sustained. Hence it must always be submitted to them to find whether it existed. The court has no right to find it, nor to instruct the jury that they may return a verdict for the plaintiff without it. Even the inference of malice from the want of probable cause is one which the jury alone can draw. Wheeler v. Nesbit *et al.*, 24 How. 545; Newell v. Downs, 8 Blackf. (Ind.) 523; Johnson v. Chambers, 10 Ired. (N. C.) L. 287; Voorhees v. Leonard, 1 N. Y. Sup. Ct. 148; Schofield v. Ferrers, 47 Pa. St. 194. In Mitchell v. Jenkins, 5 Barn. & Adol. 588, Lord DENMAN said: "I have always understood the question of reasonable or probable cause on the facts found to be a question for the opinion of the court, and malice to be altogether a question for the jury." He added, that inasmuch as in that case the question of malice had been wholly withdrawn from the jury, there ought to be a new trial. In the case we have in hand, the question was withheld from the jury, and nothing was submitted to them but an estimate of damages.

There was also error in the charge, in so far as it took away from the defendants the protection of probable cause for their instituting

the proceedings in bankruptcy. The court ruled that the defense could not be sustained by proving they had probable cause for believing the plaintiff had committed an act of bankruptcy, because, after the proceedings had been commenced, it was established by a verdict and a judgment thereon that the plaintiff was not indebted to them, and consequently that they had no right to institute bankruptcy proceedings against him. It was further charged that "if they had no legal claim or demand against the plaintiff, then whether they had probable cause or not, they had no right to institute the proceedings. They cannot go back and allege that though they had not a legal claim or debt against him, they thought they had or that they had probable cause to believe they had such a demand. Unless they had a debt they cannot allege probable cause for proceeding in bankruptcy at all." To this we cannot assent. The existence of a want of probable cause is, as we have seen, essential to every suit for a malicious prosecution. Both that and malice must concur. Malice, it is admitted, may be inferred by the jury from want of probable cause, but the want of that cannot be inferred from any degree of even express malice. Sutton v. Johnstone, 1 T. R. 493; Murray v. Long, 1 Wend. (N. Y.) 140; Wood v. Weir & Sayre, 5 B. Mon. (Ky.) 544. It is true that what amounts to probable cause is a question of law in a very important sense. In the celebrated case of Sutton v. Johnstone, the rule was thus laid down: "The question of probable cause is a mixed question of law and of fact. Whether the circumstances alleged to show it probable are true, and existed, is a matter of fact; but whether, supposing them to be true, they amount to a probable cause, is a question of law." This is the doctrine generally adopted. McCormick v. Sisson, 7 Cow. (N. Y.) 715; Besson v. Southard, 10 N. Y. 236.

It is, therefore, generally the duty of the court, when evidence has been given to prove or disprove the existence of probable cause, to submit to the jury its credibility, and what facts it proves, with instructions that the facts found amount to proof of probable cause, or that they do not. Taylor v. Williams, 2 Barn. & Adol. 845. There may be, and there doubtless are, some seeming objections to this rule, growing out of the nature of the evidence, as when the question of the defendants' belief of the facts relied upon to prove want of probable cause is involved. What their belief was is always a question for the jury.

The Circuit Court thought in the present case, and so charged, that the fact that after the institution of the bankruptcy proceedings a judgment was given in the Barbour Circuit Court against the defendants, thus determining that the plaintiff was not indebted to them, precluded them from setting up that they had probable cause for their action. That was giving undue effect to the judgment. The conduct of the defendants is to be weighed in view of what appeared to them when they filed their petition in the bankrupt court,—not in the light of subsequently appearing facts. Had they reasonable cause for their action when they took it? Not what the actual fact was, but what they had reason to believe it was. Faris v. Starke, 3 B. Mon. (Ky.) 4, 6; Raulston v. Jackson, 1 Sneed (Tenn.) 128.

In every case of an action for a malicious prosecution or suit, it must be averred and proved that the proceeding instituted against the plaintiff has failed, but its failure has never been held to be evidence of either malice or want of probable cause for its institution; much less that it is conclusive of those things. Cloon v. Gerry, 13 Gray (Mass.) 201; 1 Hilliard, Torts, and cases there collected. The final judgment in the Circuit Court of Barbour county did not, therefore, justify the court in charging either that there was no probable cause for the bankruptcy proceedings, or that the presence or absence of such cause was immaterial. If when they filed their petition to have the plaintiff declared a bankrupt, the defendants believed, and had reasonable cause to believe, that the plaintiff was indebted to them for the goods sold to E. Leipzeiger & Co. in 1867, and had reasonable cause to believe that he had committed an act of bankruptcy, there was probable cause for their action, and the plaintiff was not entitled to recover. That they had reasonable cause to believe an act of bankruptcy had been committed must be conceded in view of the manner in which the judgment of Jonas Sonneborn against him had been obtained on the 12th of June, 1873, and in view of the decision of this court in Buchanan v. Smith, 16 Wall. 277. If, therefore, they had an honest and reasonable conviction that the plaintiff was their debtor, that he was liable to them for the bills of goods sold by them in 1867 to Leipzeiger & Co., they had probable cause for instituting the proceedings in bankruptcy, and their defense was complete. The jury should have been so instructed.

We think, also, there was error in refusing to charge the jury as

requested in the defendants' first point, which was as follows: "If the jury believe, from all the evidence, that A. T. Stewart & Co. acted on the advice of counsel in prosecuting their claim against Sonneborn in the Circuit Court of Barbour county, and upon such advice had an honest belief in the validity of their debt, and their right to recover in said action; and in the institution of the bankruptcy proceedings acted likewise on the advice of counsel, and under an honest belief that they were taking and using only such remedies as the law provided for the collection of what they believed to be a *bona fide* debt, they having first given a full statement of the facts of the case to counsel,—then there was not such malice in the wrongful use of legal process by them as will entitle the plaintiff to recover in this form of action." This the court refused to affirm, "except as contained and qualified in the preceding charge." An examination of the charge, however, reveals that the instruction was not contained in it, nor alluded to. The defendants, we think, had a right to have it affirmed as presented. There was enough in the evidence to justify its presentation. It was proved that, before they commenced their suit in the Circuit Court of Barbour county, the defendants were advised by an eminent lawyer of Alabama, of twenty-five years' standing in the profession, respecting their legal right to recover the debt from the plaintiff, that, in his opinion, the plaintiff was liable therefor. It was further testified that the same lawyer advised them that, in his opinion, the plaintiff had rendered himself liable to involuntary bankruptcy proceedings by suffering his brother's judgment to go against him by default, and by advertising his entire stock of goods at and below New York cost. It was not until after this advice had been given that the petition in bankruptcy was prepared and filed.

That the facts stated in the point proposed, if believed by the jury, were a perfect defense to the action; that they constituted in law a probable cause, and being such, that malice alone, if there was such, was insufficient to entitle the plaintiff to recover, is, in view of the decisions, beyond doubt. Snow v. Allen, 1 Stark. 502; Ravenga v. Mackintosh, 2 Barn. & Cress. 693; Walter v. Sample, 25 Pa. St. 275; Cooper v. Utterbach, 37 Md. 282; Omstead v. Partridge, 16 Gray (Mass.) 381. These cases, and many others that might be cited, show that if the defendants in such a case as this acted *bona fide*, upon legal advice, their defense is perfect.

* * * * *

Judgment of the Circuit Court reversed.

BRADLEY, J., dissented on the ground that being a creditor is a condition precedent to the right to institute proceedings in bankruptcy.

NOBLETT v. BARTSCH.

(31 Wash. 24; 71 Pac. 551.—1903.)

FULLERTON, C. J. This is an action for malicious prosecution. The respondent was arrested on a warrant charging him with the crime of bringing stolen property into this State from a foreign country, and confined in jail for about one week's time. At the time fixed for the preliminary hearing he was discharged at the request of the prosecution without examination or any evidence being brought against him. * * * *

From these instructions it will be observed that the trial court took the view that the showing on the part of the respondent that the prosecution against him was voluntarily dismissed cast the burden of showing probable cause therefor upon the appellants. Assuming that a voluntary dismissal is equivalent to a discharge by the committing magistrate, there are cases which maintain this view. Hidy v. Murray, 101 Iowa, 65, 69 N. W. 1138; Barhight v. Tammany, 158 Pa. 545, 28 Atl. 135, 38 Am. St. Rep. 853; Bigelow v. Sickles, 80 Wis. 98, 49 N. W. 106, 27 Am. St. Rep. 25; Bornholdt v. Souillard, 36 La. Ann. 103. On the other hand, there are cases which hold that a discharge by a committing magistrate is not even evidence of want of probable cause. Stone v. Crocker, 24 Pick. 81; Lancaster v. Langston (Ky.) 36 S. W. 521; Israel v. Brooks, 23 Ill. 575; Thompson v. Beacon Valley Rubber Co., 56 Conn. 493, 16 Atl. 554; Heldt v. Webster, 60 Tex. 207; Apgar v. Woolston, 43 N. J. Law, 57. Others, again, announce the rule that the showing of a discharge by the committing magistrate is evidence of want of probable cause, sufficient to make a *prima facie* case, but does not shift the burden of proof. Cooley on Torts, 184; Lawson's Rights, Rem. & Prac. sec. 1084; Eastman v. Monastes, 32 Or. 291, 51 Pac. 1095, 67 Am. St. Rep. 531; Scott v. Wood, 81 Cal. 398, 22 Pac. 871; Vinal v. Core and Compton, 18 W. Va. 1; Rankin v. Crane, 104 Mich. 6, 61 N. W. 1007. This latter is, we conceive, the correct

rule. Generally, the burden of maintaining the affirmative of the issue involved in the action is upon the party alleging the fact which constitutes the issue, and there is no apparent reason for making an exception in favor of actions for malicious prosecutions, more particularly as to the issue now in consideration. The very gist of an action for malicious prosecution is want of probable cause. The truth of other material allegations, such, for example, as malice, may be inferred from proof of want of probable cause, but this allegation, being of the very substance of the issue, must be substantially and expressly proved, and is never inferred or implied from the proof of anything else. We think, therefore, that the burden of proving this issue remained upon the respondent throughout the trial, and that the court erred in charging the jury to the contrary.[1]

KOLKA v. JONES.

(6 N. Dak. 461; 71 N. W. 558.—1897.)

CORLISS, C. J. The plaintiff has recovered judgment against the defendant in an action for malicious prosecution of a civil suit. At the threshold of the case we are met with the contention that for the malicious institution and prosecution of a civil action without probable cause there is no remedy, unless the person of the defendant in such action has been arrested or his property seized therein, or unless there exist special circumstances removing the case from the category to which belong ordinary civil actions. On this very interesting question we find the decisions in hopeless conflict. In this jurisdiction it is an open question, and we shall therefore settle it upon principle and in accordance with the weight of argument, without reference to the number of authorities which can be arrayed upon the opposite sides, respectively, of this controversy. It may,

[1] In Perkins v. Spaulding, 182 Mass. 218, 65 N. E. 72 (1903), it is said: "If the request had been for an instruction that the finding of the indictment was evidence of probable cause, it would have had the support of authority. See Cardival v. Smith, 109 Mass. 158, 159, 12 Am. Rep. 682, which holds that the finding of a grand jury is some evidence of probable cause. But the presiding judge was not bound to rule that the finding of the grand jury was *prima facie* evidence. Carmody v. Gaslight Co., 162 Mass. 539, 541, 39 N. E. 184."

not be amiss, however, to remark that in our opinion the scales in which are balanced the relative weight of authority on this point have turned, and that now it is no longer true, as erstwhile it was, that the adjudications preponderate in favor of the English rule, that in the absence of the arrest of the person or of the seizure of property, or of other special circumstances, the successful defendant has no remedy, despite the fact that his antagonist proceeded against him maliciously and without probable cause.

Favoring the English doctrine, we find the following authorities: Potts v. Imlay, 4 N. J. Law, 377; Mayer v. Walter, 64 Pa. St. 289; Eberly v. Rupp, 90 Pa. St. 259; McNamee v. Minke, 49 Md. 122; Wetmore v. Mellinger (Iowa) 18 N. W. 870; Mitchell v. Railroads, 75 Ga. 398; Ely v. Davis (N. C.) 13 S. E. 878; Terry v. Davis (N. C.) 18 S. E. 943; Rice v. Day (Neb.) 51 N. W. 464; Gorton v. Brown, 27 Ill. 489. Opposed to the English rule, we marshal decisions from the States of Connecticut, New York, Minnesota, Kansas, Kentucky, Missouri, Colorado, Ohio, Louisiana, Michigan, Tennessee, Indiana, Vermont, Massachusetts, and California: Lipscomb v. Shofner (Tenn. Sup.), 33 S. W. 818; McCardle v. McKinley, 86 Ind. 538; Lockenour v. Sides, 57 Ind. 360; McPherson v. Runyon (Minn.), 43 N. W. 392; Closson v. Staples, 42 Vt. 209; Whipple v. Fuller, 11 Conn. 582; Marbourg v. Smith, 11 Kan. 554; Cox v. Taylor's Adm'r, 10 B. Mon. 17; Pangburn v. Bull, 1 Wend. 345; Eastin v. Bank, 66 Cal. 123, 4 Pac. 1106; Woods v. Finnell, 13 Bush. 629; Allen v. Codman, 139 Mass. 136, 29 N. E. 537; Smith v. Burrus, 106 Mo. 94, 16 S. W. 881; Johnson v. Meyer, 36 La. Ann. 333; Hoyt v. Macon, 2 Colo. 113; Brady v. Ervin, 48 Mo. 553; Antcliff v. June, (Mich.) 45 N. W. 1019; Pope v. Pollock, 46 Ohio St. 367, 21 N. E. 356; Brand v. Hinchman (Mich.), 36 N. W. 664; O'Neill v. Johnson (Minn.) 55 N. W. 601; Dolan v. Thompson, 129 Mass. 205; Sartwell v. Parker, 141 Mass. 405, 5 N. E. 807.

In the case at bar it appears that the defendant in the civil actions alleged to have been prosecuted maliciously and without probable cause was not arrested, and that his property rights were not in any manner interfered with. The suits complained of consisted of three successive actions instituted in justice's court upon the same claim, each case being voluntarily dismissed by the defendant herein when the day for trial arrived. Without at this point adverting more particularly to the facts, we will dispose of the question whether the action will lie, assuming the suit to have been maliciously

brought without probable cause. We wish to settle the law in this State, not upon the peculiar features of this case, but upon the broad basis that the malicious prosecution of a civil action without probable cause is a legal wrong, for which the law will afford redress, without reference to any inquiry touching the seizure of property, the arrest of the person, or other special circumstances. Before the statute of Marlbridge (52 Hen. III.) an action for the malicious prosecution without probable cause of a mere civil action would lie. Closson v. Staples, 42 Vt. 209–214; Lockenour v. Sides, 57 Ind. 364; Lipscomb v. Shofner (Tenn. Sup.), 33 S. W. 818; Pope v. Pollock, 46 Ohio St. 367, 21 N. E. 356; 14 Am. & Eng. Enc. Law, 32. Why this rule should have been departed from after the act of 52 Hen. III. had been passed, is apparent from the language of that act. It gave to the defendant who had prevailed in the cause, not merely his costs, but also his damages; and, to make apparent the purpose of Parliament to substitute this remedy for the action for malicious prosecution, these costs and damages were given only in actions which were malicious, and not in all actions generally. Railroad Co. v. McFarland, 44 N. J. Law, 674–676. Subsequent legislation in England shows that the statute of Marlbridge was enacted, not as a general law regulating costs, but to afford a summary remedy to the successful defendant in place of the existing right of action to recover his damages on account of the malicious prosecution of a civil action against him. The statute of Gloucester (6 Edw. I. c. 1) gave the defendant costs where he recovered damages, and finally, by the act of 23 Hen. VIII. c. 15, the defendant was given costs in all cases in which he was successful, whether he recovered damages or not, provided the case was one in which the plaintiff could have recovered costs had he been the prevailing party. Railroad Co. v. McFarland, 44 N. J. Law, 674–676. The act of the British Parliament which was held to take away the existing cause of action for damages for the malicious prosecution of a civil suit was an act which in terms was limited to cases of that kind; and when it is remembered that it gave the defendant, not merely his costs, but also his damages, it is obvious that the statute was framed to give the successful defendant his remedy in the very case in which he was maliciously prosecuted, instead of compelling him to seek his remedy in an independent action.

Between such legislation and the statutory enactments of this country on the subject of costs there is the widest possible differ-

ence. The statute of Marlbridge was limited to civil actions maliciously prosecuted, and gave the defendant the damages he had suffered because of such perversion of the forms and remedies of the law, whereas the statutes regulating costs on this side of the water are not restricted to actions in which the motive prompting the litigation was unjustifiable, but are intended to apply to all cases, to the end that some indemnity to the other suitor may be afforded in every case, independently of the state of mind of the person bringing the suit, on the question whether he had reasonable ground for believing that the action could be maintained; leaving the remedy for a perversion of legal machinery to the common-law maxim that for every wrong the law will give legal redress. General statutes regulating costs make no discrimination between the honest suitor, who, having a valid claim, may yet fail, for some reason, to establish it in court, and the malignant persecutor and harasser of a citizen, who, by his abuse of legal forms, causes heavy damage to such citizen, in property, reputation, and business prospects, by the unfounded suit, which he who institutes it knows full well he cannot maintain. Each must pay the statutory costs, and the same rule measures the liability of each for such costs. That our meager bill of costs was intended to recompense the victim of the malicious prosecution of a civil suit is, to our minds, unthinkable. It is true that our statute gives the successful suitor a right to recover some trifling items of costs, and certain specified disbursements, as indemnity; but it is indemnity for the defense (in the case of a defendant) of an action, without reference to the question whether there has been a malicious perversion of legal remedies. If it was enacted to cover cases of an abuse of legal machinery, then it is evident that all remedy for such an abuse was intended to be withheld; for, in such a view of the statute, he who lawfully uses and he who maliciously perverts the right to sue would stand upon precisely the same footing with respect to the question of liability for their respective acts. Even when the plaintiff has acted in the utmost good faith the defendant will often suffer, on account of the suit, damages which taxable costs will not even approximately compensate. But it is the policy of the law not to throw around the right of the citizen to appeal to the courts for redress such risks that fear of the possible consequences will deter him from asserting a claim he honestly deems himself entitled to enforce. In ordinary cases the injury a defendant suffers, beyond the slight indemnity which

statutory costs afford him, is one of the many inevitable burdens which men must sustain under civil government. He is forced to bear it for the public good. A wise policy requires that the honest claimant should not be frightened from invoking the aid of the law by the statutory threat of a heavy bill of costs against him in case of defeat. But certainly no such policy demands that malice should, by the assurance of protection in advance, be encouraged to vex, damage, and even ruin a peaceful citizen by the illegal prosecution of an action upon an unfounded claim.[1]

§ 4.—MALICIOUS ABUSE OF PROCESS.

ZINN v. RICE.

(154 Mass. 1.—1891.)

The present defendant, in a contract action against the present plaintiff to recover $4,522.45, laid his damages in his writ at $40,000, and levied several attachments on real property of great value and on stock worth $100,000. In this suit plaintiff sought to recover damages for such malicious levies of excessive attachments, but was nonsuited on the ground that the prior action had not been terminated, and excepts.

W. ALLEN, J. It is not contended that the facts alleged in the declaration, and offered to be proved at the trial, are not sufficient to sustain an action by the plaintiff against the defendant. The defendant's contention is that the action is prematurely brought; that it is an action for malicious prosecution, and subject to the rule that a suit for malicious prosecution cannot be maintained until the prosecution has terminated in favor of the plaintiff. But the rule applies only to suits for maliciously instituting groundless prosecutions, and does not apply to the injurious and malicious use of process in proceedings which were commenced with probable cause.

[1] In Luby v. Bennett, 111 Wis. 613, 87 N. W. 804, 87 Am. S. R. 897, 56 L. R. A. 261 (1901), the court said: "We think the doctrine is well established by the great preponderance of authority that no action will lie for the institution and prosecution of a civil action with malice and without probable cause, where there has been no arrest of the person or seizure of the property of defendant, and no special injury sustained which would not necessarily result in all suits prosecuted to recover for like causes of action."

The latter, being for the malicious use of legal process by acts authorized by its terms, may be called "actions for malicious prosecution," to distinguish them from actions for the abuse of process by doing under color of legal process acts not authorized by it; but there is no rule of law that in such an action the termination of any former suit must be shown. The rule is founded on the necessity of proving that a prosecution which itself puts in issue the truth of the charge on which it is founded is without probable cause. A defendant in such an action cannot bring another action to try the issue tendered him in the first while that issue is pending. The rule is, by its terms and nature, limited to a prosecution to establish a charge or cause of action, and cannot include an *ex parte* use of process incidental and collateral to such a prosecution, and in defense to which falsity of the charge cannot be shown. Parker v. Langly, 10 Mod. 209; Fortman v. Rottier, 8 Ohio St. 548; Bump v. Betts, 19 Wend. 421; Barnett v. Reed, 51 Pa. St. 190; Jenings v. Florence, 2 C. B. (N. S.) 467; Churchill v. Siggers, 3 El. & Bl. 929; Wentworth v. Bullen, 9 Barn. & C. 840; Wood v. Graves, 144 Mass. 365; Everett v. Henderson, 146 Mass. 89; Savage v. Brewer, 16 Pick. 453; Bicknell v. Dorion, Id. 478. In the case at bar the grievance of the plaintiff is not that the defendant maliciously commenced a groundless suit. He admits that the plaintiff had a good cause of action, and that there is no defense to the suit, and that its termination cannot be in his favor. Nor is his grievance that the defendant abused the process in the former suit, and, under color of it, did things not authorized by its terms. His grievance is that the defendant, having a just cause of action, and a legal suit against this plaintiff, made an excessive attachment of property, which he knew was not needed for the security of his debt, not for the purpose of securing his debt, but for the purpose of injuring the plaintiff. If the plaintiff has any right of action, which is not controverted, it is idle to say that he must wait until the former action has terminated in his favor.

The defendant contends that the amount of the debt must be fixed by the determination of the former suit, and that it cannot be shown in this suit. We know of no authority or reason for this. The amount of the debt cannot exceed the amount declared for in the suit, and that is admitted to be due, so far certainly as affects this suit. Beyond that there is no question in the former suit, and no issue, and the proceedings complained of were *ex parte*, and

they were terminated by the reduction of the attachment. It is argued that the plaintiff in that suit may amend his declaration, and introduce a new cause of action. That case, as stated by the plaintiff himself, does not present any issue involved in the case at bar, and the possibility that a new cause of action may be added, if it existed, would not be sufficient to show that the issues presented in this case are pending in that, or to bring it within the terms or reason of the rule that the liability of this plaintiff to such possible cause of action can be tried only in that action.

Exceptions sustained.[1]

WOOD v. GRAVES.

(144 Mass. 365.—1887.)

Tort, in three counts, against Josiah G. Graves and W. W. Bailey. At the trial in the Superior Court, before KNOWLTON, J., the jury returned a verdict for the plaintiff in the sum of $7,500; and the defendants alleged exceptions, which appear in the opinion.

C. ALLEN, J. The three counts of the declaration are treated by the counsel for the defendants as being counts respectively for malicious prosecution, for false imprisonment, and for abuse of

[1] In Bonney v. King, 201 Ill. 147, 66 N. E. 377, (1903) it is said: "In an action for the malicious abuse of legal process, if the declaration alleges that the process was abused in order to coerce the plaintiff to do some collateral thing or to accomplish some improper ulterior purpose, it may not be necessary to aver that the process is at an end. 18 Ency. of Pl. & Pr. 452; 10 Am. & Eng. Ency. of Law (2d Ed.) 632. The declaration here under consideration does not aver that the process of the courts, in any of the actions against appellant, has been used for a purpose such process was not intended by law to effect. Two elements are necessary to an action for the malicious abuse of legal process: First, the existence of an ulterior purpose; and, second, an act in the use of the process not proper in the regular prosecution of the proceeding. 19 Am. & Eng. Ency. of Law (2d Ed.) 630, 631. Regular and legitimate use of process, though with a bad intention, is not a malicious abuse of process. The declaration does not aver either that the plaintiff was arrested or his property seized. The mere institution of civil suits does not constitute a malicious abuse of process. That action lies for the improper use of process after it has been issued, not for maliciously causing process to be issued. 19 Am. & Eng. Ency. of Law (2 Ed.) 632."

criminal process; and the trial appears to have proceeded upon that ground. No question as to the form of the declaration has been raised. The court correctly ruled, upon the request of the defendant, that, upon the evidence, the plaintiff could not maintain an action for malicious prosecution, the prosecution not having been brought to a termination. The principal questions arise upon the other requests by the defendants for instructions.

The court declined to rule that, upon the evidence, the plaintiff could not maintain an action for false imprisonment against either of the defendants. No action would lie for false imprisonment by reason of what was done in pursuance of the warrant of the governor in the extradition of the plaintiff from Massachusetts to New Hampshire, or of what was done in pursuance of any lawful precept issued upon the indictment in New Hampshire; but if acts were done in excess of what was authorized, and if the process of law was abused, the remedy might be by an action for false imprisonment. The court therefore properly declined to adopt the language of the defendants' second request, and all the rights of the defendants in respect to this were saved by the course of the instructions in relation to the wrongful use of process already commenced.

There is no doubt that an action lies for the malicious abuse of lawful process, civil or criminal. It is to be assumed, in such a case, that the process was lawfully issued for a just cause, and is valid in form, and that the arrest or other proceeding upon the process was justifiable and proper in its inception. But the grievance to be redressed arises in consequence of subsequent proceedings. For example, if, after an arrest upon civil or criminal process, the person arrested is subjected to unwarrantable insults and indignities, is treated with cruelty, is deprived of proper food or is otherwise treated with oppression and undue hardship, he has a remedy by an action against the officer, and against others who may unite with the officer in doing the wrong. It is sometimes said that the protection afforded by the process is lost, and that the officer becomes a trespasser *ab initio*. Esty v. Wilmot, 15 Gray, 168; Malcom v. Spoor, 12 Met. 279. This rule, however, is somewhat technical, and is hardly applicable to others than the officer himself. But the principle is general, and is applicable to all kinds of abuses outside of the proper service of lawful process, whether civil or criminal, that for every such wrong there is a remedy not only against the officer whose duty it is to protect the person under

arrest, but also against all others who may unite with him in inflicting the injury. Perhaps the most frequent form of such abuse is by working upon the fears of the person under arrest for the purpose of extorting money or other property, or of compelling him to sign some paper, to give up some claim, or to do some other act, in accordance with the wishes of those who have control of the prosecution. The leading case upon this subject is Grainger v. Hill, 4 Bing. N. C. 212, where the owner of a vessel was arrested on civil process, and the officer, acting under the directions of the plaintiffs in the suit, used the process to compel the defendant therein to give up his ship's register, to which they had no right. He was held entitled to recover damages, not for maliciously putting the process in force, but for maliciously abusing it, to effect an object not within its proper scope. In Page v. Cushing, 38 Maine, 523, the same doctrine was held applicable to the abuse of criminal process. Holley v. Mix, 3 Wend. 350, is to the same effect, and it was held that an action for false imprisonment will lie against an officer and a complainant in a criminal prosecution, where they combine and extort money from a person accused, by operating upon his fears, though the person was in custody of the officer under a valid warrant, issued upon a charge of felony. The case of Baldwin v. Weed, 17 Wend. 224, was an action for false imprisonment. The plaintiff had been indicted in New York; he was arrested in Vermont, and carried to New York for trial. The defendant Weed procured the requisition, was present at the arrest, and caused the plaintiff to be put into irons, with the purpose to secure two small debts. The plaintiff executed to Weed a bond for the delivery of property much in excess of the debts. The action for malicious prosecution failed, but the court (NELSON, Ch. J.) declared that an action of trespass, assault and false imprisonment should have been brought, and was the appropriate remedy for the excess of authority and abuse of the process; and intimated to the plaintiff to amend his pleadings accordingly. See also Carleton v. Taylor, 50 Vt. 220; Mayer v. Walter, 64 Penn. St. 283. On similar grounds an officer becomes responsible in damage for abuse of process, or as trespasser *ab initio* by reason of such abuse, who omits to give an impounded beast reasonable food and water while under his care, Adams v. Adams, 13 Pick. 384, or who stays too long in a store where he has attached goods, Rowley v. Rice, 11 Met. 337; Williams v. Powell, 101 Mass. 467; Davis v. Stone, 120

Mass. 228, or who keeps a keeper too long in possession of attached property, Cutter v. Howe, 122 Mass. 541, or who places in a dwelling house an unfit person as keeper, against the owner's remonstrance. Malcom v. Spoor, *ubi supra.*

In various other cases, where it has been said that the only remedy was by an action for malicious prosecution, the whole grievance complained of consisted in the original institution of the process, and no abuse in the mere manner of serving it was alleged. Such cases are Mullen v. Brown, 138 Mass. 114; Hamilburg v. Shepard, 119 Mass. 30; Coupal v. Ward, 106 Mass. 289; and O'Brien v. Barry, 106 Mass. 300. The case of Hackett v. King, 6 Allen, 58, was trover for the conversion of property which the plaintiff conveyed to the defendant under alleged duress. In Taylor v. Jaques, 106 Mass. 291, the question arose in another form, the action being on the promissory note, in defense to which the defendant alleged that his signature was procured by duress. * * * *

Judgment reversed on other grounds.

CHAPTER VIII.

ASSAULT AND BATTERY.

§ 1.—WHAT CONSTITUTES THE TORT.

CLARK v. DOWNING.

(55 Vt. 259.—1882.)

ROYCE, Ch. J. (Minor points omitted.) The only other exception was to the refusal of the court to charge as requested. The evidence referred to in the exceptions, and upon which the request was predicated, and the question of what in law constitutes an assault, have to be considered in deciding whether the request should have been complied with or not. It appears that the evidence as to what transpired at the time and upon the occasion when it was claimed that the assault was committed was conflicting, and the request was based upon the supposition that the jury might find the fact as the plaintiff's evidence tended to show.

Admitting that the jury might so find, did the striking of the plaintiff's horse constitute an assault upon the plaintiff? It is not necessary to constitute an assault that any actual violence be done to the person. If the party threatening the assault have the ability, means and apparent intention to carry his threat into execution, it may in law constitute an assault. The disposition, accompanied with a present ability to use violence, has been held to amount to an assault. Where violence is used it is not indispensably necessary that it should be to the person. It was decided in Hopper v. Reeve, 7 Taunt. 698, that the upsetting of a chair or carriage in which a person was sitting was an assault; in Morton v. Shoppe, 3 C. & P. 373, that riding after a person at a quick pace and compelling him to run into his garden to avoid being beaten was an assault; that the striking of the horse upon which the wife of the plaintiff was riding was an assault upon the wife. 1 Stephen N. P. 210.

An assault is defined in Hays v. People, 1 Hill, 351, to be an

attempt with force or violence to do a corporal injury to another. The striking of the plaintiff's horse in the manner that his evidence tended to show would probably result in a corporal injury to him; hence the request should have been complied with.

The case should have been submitted to the jury for them to find whether the striking was as the plaintiff claimed it to have been, or in the manner and for the reasons indicated in the defendant's plea.

Judgment reversed, and cause remanded.

BEACH v. HANCOCK.

(27 N. H. 223.—1853.)

Trespass, for an assault.

Upon the general issue it appeared that, the plaintiff and defendant being engaged in an angry altercation, the defendant stepped into his office, which was at hand, and brought out a gun, which he aimed at the plaintiff in an excited and threatening manner, the plaintiff being three or four rods distant. The evidence tended to show that the defendant snapped the gun twice at the plaintiff, and that the plaintiff did not know whether the gun was loaded or not, and that, in fact, the gun was not loaded. [The court ruled that the pointing of a gun, in an angry and threatening manner, at a person three or four rods distant, who was ignorant whether the gun was loaded or not, was an assault, though it should appear that the gun was not loaded, and that it made no difference whether the gun was snapped or not.]

GILCHRIST, C. J. Several cases have been cited by the counsel of the defendant to show that the ruling of the court was incorrect. (After considering and distinguishing these cases, the learned judge proceeded:) One of the most important objects to be attained by the enactment of laws and the institutions of civilized society is, each of us shall feel secure against unlawful assaults. Without such security society loses most of its value. Peace and order and domestic happiness, inexpressibly more precious than mere forms of government, cannot be enjoyed without the sense of perfect security. We have a right to live in society without being put in

fear of personal harm. But it must be a reasonable fear of which we complain. And it surely is not unreasonable for a person to entertain a fear of personal injury, when a pistol is pointed at him in a threatening manner, when, for aught he knows, it may be loaded, and may occasion his immediate death. The business of the world could not be carried on with comfort, if such things could be done with impunity.

We think the defendant guilty of an assault, and we perceive no reason for taking any exception to the remarks of the court.[1]

BISHOP v. RANNEY.

(59 Vt. 316.—1887.)

General *assumpsit*. Plea in offset. Heard on referee's report. Judgment for plaintiff.

Plaintiff contracted to work for defendant until his sawing was done. Before the term of service had expired he left defendant's

[1] See Leach v. Leach 11 Tex. Civ. App. 699, 33 S. W. 702 (1895). STEPHENS J. One count of the petition filed against Thomas Leach in this case charged him with an assault upon the wife of Moses Leach (his nephew), with intent to have carnal knowledge of her. The charge submitting this issue is complained of, in that it authorized the jury, in assessing the damages, to take into consideration the humiliation and distress suffered by reason of such unlawful assault, though unaccompanied with any battery. It is insisted that the Trott Case, 86 Tex. 412, 25 S. W. 419, is authority for the proposition that, without a battery, no such injury results to the person from an assault as will warrant the recovery of compensation for mental suffering. Such misinterpretation of that decision seems to us as clearly inadmissible as the proposition itself is unreasonable. An assault and an assault and battery violate alike the right of personal security, and are attended with like injuries to the person, differing only in the extent thereof. This right may be violated, and the person injured, without touching the body. False imprisonment is usually effected by means of an assault without a battery, and yet it is as old as the action itself to allow damages as compensation for the humiliation involved. 1 Sedg. Dam. (8th Ed.) § 43. It is too plain for argument, we think, that a willful violator of woman's most sacred right of personal security, such as the verdict finds plaintiff in error to have been, though her body be not touched, except by his foul breath and speech, should respond in damages for an outrage to her feelings which proceeds so directly from his concurrent criminal purpose and act. No other questions are sufficiently briefed to call for a decision of them. The judgment is therefore affirmed.

employment because of his treatment of him. This action was brought to recover a balance of wages due him (plaintiff). Defendant claimed damage because plaintiff did not perform his contract as to time. As to plaintiff's justification for so leaving, the referee found: "On the twenty-fifth of April, defendant and plaintiff were at work together in the mill-ward. Defendant sent his boy up to Mr. Colby's to get him to come down. The boy came back, saying Mr. Colby would be at home by the time he got there. The boy went. Soon the plaintiff and defendant went to supper. While at the table defendant expressed surprise that his boy did not return. Plaintiff said Mr. Colby was at work for Mr. Dowd, and not at home. Defendant said, 'Why didn't you tell me that before I sent him back?' Plaintiff replied, 'I did not know where you sent him.' Defendant replied, 'You did know it.' Plaintiff reiterated that he did not. Defendant rose from the table in a threatening manner, and said violently to plaintiff that he must not tell him he lied in his own house. Defendant's mother told him to sit down. Plaintiff made no reply, but after finishing his supper he told the defendant that he might find another man, as he should work no longer. The defendant is a much larger and more powerful man than the plaintiff. The plaintiff made no reply to defendant when he rose from the table because he feared violence. Plaintiff worked no more."

VEAZEY, J. The case involves the question whether the report shows that the plaintiff was justified in leaving the defendant's employment before the expiration of the term of service contracted for. The plaintiff claims that the conduct of the defendant constituted an assault, and therefore justified his leaving, although there was no battery.

In 2 Greenl. Ev. sec. 82, an assault is defined to be an inchoate violence to the person of another, with the present means of carrying the intent into effect, and the author cites 1 Steph. N. P. 208; Finch's Law, 202. He further says: "Mere threats alone do not constitute the offense; there must be proof of violence actually offered;" citing Stephens v. Myers, 4 Car. & P. 349; Tuberville v. Savage, 1 Mod. 3. And he further says: "The intention to do harm is of the essence of an assault." Jones v. Wylie, 1 Car. & K. 257. In Add. Torts, the author says: "Every attempt, also, to offer with force and violence to do hurt to another constitutes an assault."

And upon the authority of Read v. Coker, 13 C. B. 860, he further says: "And any gesture or threat of violence exhibiting an intention to assault, with the means of carrying that threat into effect, is an assault," unless immediate contact is impossible. Cobbett v. Grey, 4 Exch. 729, 744. In Clark v. Downing, 55 Vt. 259, 262, ROYCE, Ch. J., says: "If the party threatening the assault have the ability, means and apparent intention to carry his threat into execution, it may in law constitute an assault." Bishop says: "An assault is an unlawful physical force, partly or fully put in motion, which creates a reasonable apprehension of immediate physical injury to a human being." 2 Bish. Crim. Law, sec. 32.

We think, in the light of these definitions and decisions, the plaintiff is correct in his claim that there was an assault. Following the angry controversy of words was a threatening movement, in close proximity, accompanied by violent language in the nature of a threat, and by a much larger and more powerful man than the plaintiff; and the demonstration caused the plaintiff to fear violence.

KEEP v. QUALLMAN.

(68 Wis. 451.—1887.)

The parties are neighbors, but not friends. On a certain Sunday afternoon they met in a public highway. Several other persons were present. The testimony tends to show that the defendant accosted the plaintiff by asking him, "What is the reason you are slandering me around all the time?" that immediately the plaintiff put his hand in his pocket, and was about taking it out again when the defendant struck him on the head with a cane twice, knocking him down. He got up, and, as the defendant testifies, attacked the latter, whereupon they fought with their fists until plaintiff was vanquished and retreated. The defendant also testifies that he had just then heard that the plaintiff had told their neighbors to watch him; that previously he had been told that, at different times, the plaintiff had threatened to inflict personal violence upon him, and that plaintiff was in the habit of shooting people, and was a dangerous man; and when he put his hand in his pocket, the movement indicated to his (the defendant's) mind an intention to draw a

revolver. The court excluded other testimony offered by the defendant to show that the plaintiff was of a quarrelsome disposition and in the habit of using dangerous weapons. The jury were instructed that the defendant had shown no legal justification for the assault, and hence the defendant was liable to respond in damages therefor, and the case was submitted to the jury only for an assessment of damages. The damages were assessed at $175. A motion for a new trial was denied, and judgment was entered for the plaintiff pursuant to the verdict.

The defendant appeals from the judgment.

LYON, J. It was not unlawful for the defendant to address the plaintiff as he did when they met on the highway, and if the plaintiff by his former threats of personal violence (if he made any), and by putting his hand in his pocket as testified to by the defendant (if he did so), gave the defendant reason to believe that he was about to draw a revolver or other weapon upon him, it was an assault, and the defendant had the right to act upon appearances and at once repel or prevent the supposed contemplated attack. (See 1 Whart. Crim. Law, §§ 603, 606.) We think the testimony sufficient to send to the jury the question whether the acts of the plaintiff were sufficient to give the defendant reason to believe that he was in imminent danger of being attacked by the plaintiff when he knocked the latter down. That is to say, we think the testimony tends to prove a state of facts from which the jury might properly find the defendant was legally justified in striking the blows to prevent the plaintiff from attacking him. Hence the instruction that the defendant was absolutely liable in the action was erroneous. The instruction should have been that if the defendant had no reasonable grounds to fear an immediate attack by the plaintiff, or, having such grounds, if he used more force than was necessary to prevent such attack, the plaintiff could recover; otherwise not.

We are also inclined to think that on the authority of State v. Nett, 50 Wis. 524, proof of the quarrelsome and violent disposition of the plaintiff should have been received, as elements in the correct solution of the questions above suggested.

RICHMOND v. FISK.

(160 Mass. 84.—1893.)

Tort: first count for assault and battery; second, for trespass upon plaintiff's close. Defendant delivered milk to plaintiff at an early hour every morning, the hall and kitchen doors being left unlocked so that he could enter and leave the milk. Plaintiff had forbidden the defendant entering the former's sleeping room. On the morning in question after a night of suffering from sick headache, the plaintiff had fallen asleep, when the defendant entered the sleeping room, shook the plaintiff so as to awaken him and presented a milk bill. The trial court gave judgment for the defendant, from which plaintiff appealed.

FIELD, C. J. * * * The agreed facts show that the defendant entered plaintiff's close by his permission. The fact that, after the defendant entered by permission through the outer door into the hall, he went, against the commands of the plaintiff, into plaintiff's sleeping room, does not constitute a trespass upon the close. Smith v. Pierce, 110 Mass. 35. But the facts show a trespass upon the person of the plaintiff. Com. v. Clark, 2 Met. 23. On the facts agreed, it must be taken that the defendant, against the express commands of the plaintiff, entered the plaintiff's sleeping room and "took hold of his arm and shoulders and used sufficient force to awaken the plaintiff for the purpose of presenting a milk bill." If there were any circumstances which would justify this, they do not appear in the agreed statement of facts. Although this trespass is slight, the damages are not necessarily nominal, and they should be left to be assessed by the Superior Court.

The judgment should be reversed, and, in accordance with the agreed statement, the plaintiff's damages should be assessed under the first count.

LUND v. TYLER.

(115 Ia. 236; 88 N. W. 333.—1901.)

McCLAIN, J. There was evidence tending to show that at the beginning of the fight which resulted in the injury to plaintiff the plaintiff had challenged the defendant to the combat, using insulting language in doing so; and the principal complaint of appellant is of the refusal of the trial court to instruct that if plaintiff, by his actions and words, invited the fight in which he was injured, he cannot recover damages for such injuries. There seems to be some authority for such a proposition, and counsel for appellant have cited Galbraith v. Fleming, 60 Mich. 408, 27 N. W. 583; Smith v. Simon, 69 Mich. 481, 37 N. W. 548. But the weight of authority is that, where a combat involves a breach of the peace, the mutual consent of the parties thereto is to be regarded as unlawful, and as not depriving the injured party, or, for that matter, each injured party, from recovering damages for injuries received from the unlawful acts of the other. Shay v. Thompson, 59 Wis. 540, 18 N. W. 473, 48 Am. Rep. 538; Stout v. Wren, 8 N. C. 420, 9 Am. Dec. 653; McCue v. Klein, 60 Tex. 168, 48 Am. Rep. 260; State v. Burnham, 56 Vt. 445, 48 Am. Rep. 801. This view of the law is stated without qualification in Cooley, Torts (2d. Ed.) 187. Insulting conduct and language of the plaintiff towards the defendant might, no doubt, have been considered in mitigation of damages, if so pleaded; but that question was not presented in the lower court.[1]

[1] In Bartell v. State, 106 Wis. 342, 82 N. W. 142. (1900), the court said "The jury were told, in substance, and in language that could not reasonably have been misunderstood, that if Bartell treated his patient in good faith, for the purpose of curing the disease with which she was supposed to be afflicted, and in good faith caused her to expose her body to his view for the purposes of such treatment, his conduct did not constitute the offense of assault and battery; but if, on the other hand, he needlessly caused such patient to expose her person to his view for his evil purposes, and she submitted because of her ignorance, and that under these circumstances and for such purpose he secured the opportunity of laying his hands upon her body, he was guilty of the offense of assault and battery. There was no error in the charge so understood, and none would be claimed by counsel for the plaintiff in error.

The law relating to physical violations of the persons of females, accomplished by such a species of fraud or imposition as may be exercised by a person under the pretense of necessity or authority, where the violator, be-

MONTGOMERY v. BUFFALO RY. CO.

(165 N. Y. 139; 58 N. E. 770.—1900.)

This action was brought by the plaintiff against the defendant, a street-railway company, to recover damages for an assault and battery alleged to have been committed upon him by a conductor in forcibly expelling him from a car. He had paid his fare upon entering one of the defendant's cars upon a connecting line, and, with a transfer ticket, got upon the car in question. He placed himself upon the rear platform, and tendered his transfer ticket to the conductor. One of the company's rules provided that conductors should "not allow passengers to sit or stand on, or to crowd, the rear platform, but will politely request them to take seats, or to stand inside the car," and the conductor, calling plaintiff's attention to it, directed him to go inside the car. The plaintiff declined to do so, stating that he had a sick headache, was nauseated, and that he expected to be affected actively by the nausea at any moment. The conductor, however, insisted upon his compliance with the rule, and, the plaintiff refusing compliance, the car was stopped, and the plaintiff was ejected therefrom, but with no excessive force or physical injury. The defendant's motions for a non-suit were denied, and at the conclusion of the trial the jury returned a verdict in favor of the plaintiff for the sum of $60. Upon appeal to the Appellate Division in the Fourth department, the judgment recovered by the plaintiff was affirmed as to the facts, but it was reversed upon the law.

GRAY, J. The company not only had the right, but it was bound, to make the rules and regulations to insure the safe, effective, and comfortable operation of its corporate business; and whether any particular rule is lawful and reasonable is a question of law for the court. The appellant concedes that the rule of the company was a reasonable one, and thus the question is whether, because it was enforced by the conductor in the expulsion of the plaintiff from the car upon his refusal to submit to it, the company can now be

cause of his position, has exceptional opportunities for thus imposing upon his victim, is too well known to need any discussion here. It is not liable to be too often or too rigorously enforced. It was properly administered in this case so far as we can discover from the record. The assignment of error that the verdict is contrary to the evidence is not well taken. There is ample evidence to sustain it and no reversible error in the record."

made answerable in damages by reason of the conductor's action. The proposition would seem to furnish its own answer. The appellant, however, insists that, even if this rule was a reasonable regulation of the company, all rules, even if reasonable, "must have their exceptions," and whether it was reasonable to enforce the rule upon this occasion was a question to be passed upon by a jury. In other words, it is claimed that the right of enforcement may depend upon the particular circumstances, and, as the plaintiff had an excuse for noncompliance, in the present case its reasonableness, or that of the conductor's conduct, became a question for the determination of the jury. I am unable to assent to the proposition. I think that, if the rule was a reasonable one, the passenger was bound to submit to it, and that it was the duty of the conductor to enforce it. Therefore, in ejecting him from the car upon his refusal to submit, the conductor was acting lawfully in the discharge of his duty. The passenger, by his conduct, had forfeited his right to be carried any further. In Hibbard v. Railroad Co., 15 N. Y. 455, an early and leading case, the question was fully discussed, and its doctrine has been followed in this court. Pease v. Railroad Co., 101 N. Y. 367, 5 N. E. 37; Barker v. Railroad Co., 101 N. Y. 237, 45 N. E. 550, is a recent case in which the right of the carrier to make and to enforce its reasonable rules is distinctly recognized.

It might be observed that there is quite a difference between such a case as the appellant's counsel mentions, where a passenger is ejected for failure to produce his ticket upon the conductor's request, which another conductor had previously taken up and retained, and such a case as this. In the former case, it could be argued with more force that the passenger's inability to comply with the conductor's request was caused by the mistake or fault of another of the company's servants, and the theory of the corporate liability would be rested upon different propositions. A railway company is not obliged to carry persons, unless they are willing to submit to, and to be bound by, the reasonable rules and regulations which it has established. The plaintiff, if in the physical condition described by him upon the day in question, was not obliged to travel upon the defendant's street car; but if he chose to do so, he was bound to submit to its regulations. He has no sufficient reason in law for complaining because the conductor performed his duty, and compelled him to leave the car. I think the order and judgment were right, and should be affirmed, with costs.

STATE v. SHERMAN.

(16 R. I. 681.—1889.)

DURFEE, C. J. This is a criminal complaint against John P. Sherman and others for assault and battery on the person of Charles C. Sherman. It comes up here on exceptions from the Court of Common Pleas.

The bill of exceptions shows as follows: The defendant John P. Sherman was occupying as tenant a tract of land bordering on a tidal cove connecting with Point Judith pond; and Charles C. Sherman, the complainant, built a causeway of dirt and stones in the pond across the mouth of the cove, so as to close it, except for the space of about 30 feet at one end, where the water was shallow, thereby obstructing said defendant in the use of the water for ingress and egress to and from his land by boat. On the day of the assault, said defendant, wishing to go out with his sail boat, went upon the causeway to open a passage through the deeper part, and began work to that end. The complainant came down soon afterwards to stop him, and the affray occurred. After the case had been argued to the jury he (deft.) asked the court to instruct the jury as follows, to wit: "That a man in a public place, if attacked, may resist with his natural weapons, using no more force than is necessary, without retreating." The court refused, but did instruct them that in such a case a man must retreat, if he can safely, and that the defendant did not testify that there was anything to prevent his retreating. The defendant excepted to both the refusal and the instruction. The bill of exceptions sets forth that the complainant's counsel stated in his argument to the jury that he did not claim for the complainant the right to use any force to protect the causeway, or any force against the defendant, except such as he might lawfully use in any public place.

We think the court below erred. Generally, a person wrongfully assailed cannot justify the killing of his assailant in mere self-defense if he can safely avoid it by retreating. Retreat is not always obligatory, even to avoid killing; for, if attack be made with deadly weapons, or with murderous or felonious intent, the assailed may stand his ground, and, if need be, kill his assailant. But there is no question of killing here; and we know of no case

which holds that retreat is obligatory, simply to avoid a conflict. Where there is no homicide, the rule generally laid down is that the assaulted person may defend himself, opposing force to force,—using so much force as is necessary for his protection,—and can be held to answer only for exceeding such degree. Mr. Bishop, in his work on Criminal Law, § 850, says: "The assailed person is not permitted to stand and kill his adversary, if there is a way of escape open to him, while yet he may repel force by force, and, within limits differing with the facts of the case, give back blow for blow." See, also, 1 Whart. Crim. Law. § 99; Steph. Dig. Crim. Law, art. 200; May, Crim. Law, (Student's Ser. § 62.) Mr. MAY'S language is: "There seems to be no necessity for retreating, or endeavoring to escape from the assailant, before resorting to any means of self-defense short of those which threaten the assailant's life." In Com. v. Drum, 58 Pa. St. 9, 21, 22, where the defendant, who was indicted for murder, set up that he acted in self-defense, the court, in charging the jury, used the following language: "The right to stand in self-defense without fleeing has been strongly asserted by the defense. It is certainly true that every citizen may rightfully traverse the street, or may stand in all proper places, and need not flee from every one who chooses to assail him. Without this freedom, our liberties would be worthless. But the law does not apply this right to homicide." There are cases, however, which manifest a disposition to apply the same rule generally. Runyan v. State, 57 Ind. 80; Erwin v. State, 29 Ohio St. 186. In Gallagher v. State, 3 Minn. 270, the defendant was complained of for assault and battery, and set up in justification that he acted in self-defense, the complainant having stepped forward with his cane raised as if about to strike. The lower court, on trial, ruled as follows: "Where a person is approached by another with a cane raised in a hostile manner, the former is not justified in striking unnecessarily, but is bound to retreat reasonably before striking. On error the Supreme Court held the ruling to be erroneous. "Such is not the law," say the court; "but the party thus assaulted may strike, or use a sufficient degree of force to prevent the intended blow, without retreating at all." The case is exactly in point.

The exception is therefore sustained, and the cause will be remitted for a new trial.[1]

[1] In State v. Carver, 89 Me. 74, 35 At. 1030, (1896), the court declared: "That a man when assaulted be required to cowardly flee from danger, and

CHAPTER IX.

WRONGFUL DISTURBANCE OF FAMILY RELATIONS.

§ 1.—THE FAMILY HEAD AND FAMILY RIGHTS.

HUMPHREY v. POPE.

(122 Cal. 253; 54 Pac. 847.—1898.)

CHIPMAN, C. * * * 2. The more serious question is that raised by respondent for insufficiency of facts alleged. The argument is that personal rights are defined by section 43, Civ. Code, and include the right to protection from injury to personal relations, and that such injuries are carefully defined by section 49, Id., and are entirely different from injuries to the person, such as bodily restraint, bodily harm, and defamation, which are enumerated in section 43, Id. Section 49 reads: "The rights of personal relation forbid: (1) The abduction of a husband from his wife, or of a parent from his child; (2) the abduction or enticement of a wife from her husband, of a child from a parent or from a guardian entitled to its custody, or of a servant from his master." Respondent claims that "abduction" means something different from "enticement," and

not assert a manly self-defense, necessary for his protection, does not seem to comport with the laws of a free and enlightened people, and, as said by the supreme court, we cannot give our assent to such doctrine. Beard v. U. S., 158 U. S. 550, 15 Sup. Ct. 962."

A similar view is expressed in Moran v. Vicroy (Ky.), 74 S. W. 244, (1903); "The instruction offered by appellant and refused by the court that the defendant could only shoot if he had no apparently safe means of escape from said impending danger has been frequently condemned by this court. By the third instruction the jury were told that: 'If they believed from the evidence that at the time Vicroy shot and wounded plaintiff he then believed, and had reasonable grounds to believe, that he was then in danger of loss of life or great bodily harm at the hands of Moran, then he had the right to use such force as was necessary, or as to him, under all the circumstances, seemed reasonably necessary, to protect himself from injury at the hands of Moran and no more.' This instruction seems to fairly state the law."

that this is recognized by section 49, because the word "enticement" is omitted from clause 1, but is included in clause 2.

The word "abduct" is from the Latin "abduco," to lead away. Abduction is the taking away a wife, child, or ward by fraud and persuasion or open violence. Carpenter v. People, 8 Barb. 606; State v. George, 93 N. C. 570. In private or civil law it is the act of taking away a man's wife by violence or persuasion. 3 Steph. Comm. 536. In reason, the wife should be as much entitled to sue for violation of her personal right, where her husband has been taken away from her by enticement, if such right exist at all, as should the husband, when his wife has been enticed from him. Ordinarily the injury is greater to the wife than to the husband. We are unwilling to give a construction to this section which would limit the wife to an action when her husband has been forcibly taken from her. Our criminal statute as to the crime of abduction for purposes of prostitution uses the words "takes away" for the word "abduct," and it has been held "that a physical carrying away is not required to constitute the taking, but that inducements are sufficient." People v. Demousset, 71 Cal. 611, 12 Pac. 788. In the decisions of courts generally the word "abduction" and the words "taken away" are used as the equivalent of each other, as we think they in fact are. We are unwilling to impute to the legislature any intention to give to the husband a right of action for the abduction of his wife, under clause 2, § 49, Civ. Code, of which the wife is deprived by the phraseology of clause 1. The abduction meant in both clauses we think should be held to be the same. And this brings us to the question, has the wife an action against another woman for enticing the husband away from and destroying his affection for her?

It was decided as early as the nineteenth year of George II., in Winsmore v. Greenbank, Willes, 577, and has been the law ever since, that the husband has an action for enticing away his wife,—for taking away from him the comfort and society of his wife (*per quod consortium amisit*),—and the action was invented to help out the lonely and forsaken husband. But at common law the wife had no right of property in any damages recovered on her account for any cause, and was given no right of action to recover them. She was not only inferior to her husband, but she had no personal identity separate from him. As the wife was then regarded, the courts, with perfect consistency, in denying her this action, simply

added this to her many other disabilities. Obviously and grossly wrong, such, nevertheless, was the generally accepted theory of the common law. And yet it was not accepted without protest, for in Lynch v. Knight, 9 H. L. Cas. 557, Lord Chancellor CAMPBELL said: "Nor can I allow that the loss of consortium, or conjugal society, can give a cause of action to the husband alone." I have been able to find but two cases in this country not overruled, and respondent cites no others, where this barbarous discrimination has been approved. Duffies v. Duffies, 76 Wis. 374, 45 N. W. 522; Doe v. Roe, 82 Me. 503, 20 Atl. 83. The first of these decisions was placed upon the ground that neither the common law nor the statutes of the state gave the wife the right to maintain such an action. The second denies the right apparently because (1) against good policy, and (2) particularly because it is not allowed by statute.

Opposed to this view, and giving to the wife a right of action, without joining her husband, on various grounds,—in some states because the statutes have removed the disabilities from the wife, in others on the broad ground that the wife should have the action,—we find a long array of decisions the force and reasoning of which are entirely satisfactory to our minds. The courts of last resort have so held in Connecticut, New Hampshire, New York, Ohio, Michigan, Indiana, Illinois, Iowa, Misssouri, Wisconsin, Kansas, Nebraska, and Tennessee. The cases are too numerous to be cited, and we content ourselves by referring to a few of them. Bennett v. Bennett (1889) 116 N. Y. 584, 23 N. E. 17, where it was said that the common law gave the right of action, but afforded no remedy, and that the remedy is now supplied by the Code; Westlake v. Westlake (1878) 34 Ohio St. 621, where the doctrine of the common law and the reason upon which it rests are clearly pointed out; Warren v. Warren (1891) 89 Mich. 123, 50 N. W. 842, where the leading case (Duffies v. Duffies, *supra*) against the right is controverted, and many of the cases in support of the action are cited; Foot v. Card (1889) 58 Conn. 1, 18 Atl. 1027, where the points presented in the present case are fully met, and where will be found a lucid statement of the modern opinion upon the subject, and where it is held that by the very nature of the action, and "of legal necessity, therefore, damages for injury to this right must be to her solely," and this even though at the time the husband was living with his wife, the plaintiff. See, also, Price v. Price (1894) 91 Iowa, 693, 60 N. W. 202; Clow v. Chapman (1894) 125 Mo. 101,

28 S. W. 328, where it was said: "As the only reason why the wife formerly could not maintain an action for the alienation of her husband's affections was the barbarous common-law fiction that her legal existence became suspended during the marriage and merged into his, which long since ceased to obtain in this jurisdiction, there remains now not the semblance of reason, in principle, why such an action may not be maintained here."

It remains to determine whether the law of this state is such as to constrain us to adopt the effete and inhuman doctrine of the common law, or whether we may not follow the more enlightened and humane principles so universally approved in our own country. The right to sue in her own name is expressly given to plaintiff by paragraph 3, § 370, Code Civ. Proc. The only possible impediment to the right of action that may be suggested arises out of the question, would not the damages recovered be property of the community, and, if so, would not that fact require the husband to be joined? She is given the right of action, as we have seen, by section 49 Civ. Code. She is given the remedy in her own name by section 370, Code Civ. Proc. Where the husband sues for the loss of his wife's affections, the fact that the damages might or might not be held to be community property would not affect his right of action, and we can see no reason why any different rule should apply where the wife brings the action. Conceding, but not deciding, that any damages the plaintiff may recover would be community property, we think the action properly brought in her name alone.

The judgment should be reversed, and the cause remanded, with directions to overrule the demurrer.[1]

HAYNES v. NOWLIN.

(129 Ind. 581.—1891.)

ELLIOTT, C. J. The question which this record presents arises upon the ruling of the trial court sustaining a demurrer to the appellant's complaint. The question which requires our consideration and judgment is this: Can a married woman maintain an action against one who wrongfully entices her husband from her,

[1] *Accord*, Hartpence v. Rogers, 143 Mo. 623, 45, S. W. 650, (1898).

and alienates his affections? It was the boast of the common law that "there is no right without a remedy," and in the main this boast was not an idle one, but was made good by the vindication of legal rights in almost all instances where the right was appropriately presented for judicial consideration and determination. Some of the courts, however, sacrificed the principle outlined in the maxim to the demands of fancied consistency, and surrendered a clear and strong right to a barren technical rule, for they held that a wife could not maintain an action for the loss of the society, support, and affections of her husband. The fiction that the *baron* and *feme* were one person so far swayed the judgments of some of the courts as to carry them from a sound fundamental principle, and cause them to declare a doctrine revolting to every right-thinking person's sense of justice, and contrary to the foundation principles of natural right. We say that some of the cases did this, for not all gave the doctrine we refer to support; but, on the contrary, denied it, by holding that the wife might have a right of action against the wrongdoer who took her husband from her. To those cases we shall presently refer. The principle outlined in the maxim quoted requires that, even where the common law as it now exists prevails, it should be held that a wife may have an action against the wrongdoer who deprives her of the society, support, and affections of her husband. If there is any such thing as legal truth and legal right, a wronged wife may have her action in such a case as this, for in all the long category of human rights there is no clearer right than that of the wife to her husband's support, society, and affection. An invasion of that right is a flagrant wrong, and it would be a stinging and bitter reproach to the law if there were no remedy. The virtue of elasticity which has been so often ascribed to the common law (and generally very justly) is nowhere more clearly or beneficially manifested than it is in relation to the rights of married women. Long since the doctrine of feudal times, which gave so many, and such comprehensive, rights to the *baron*, and so few, and such narrow ones, to the *feme*, has given way before the enlightened thought of better ages and less barbarous times. One who should now, either in England or America, attempt to secure an enforcement of the old rules which placed the wife in such abject subjection to the husband, and stripped her of so many rights which belong, in natural justice, to a rational human being, would find a stern denial. It is beyond controversy that without the aid

of statutory enactments the harsh, unreasonable rules of the old common law have fallen before the spirit of enlightened reason and true progress. The doctrine that the wife could not maintain an action against one who deprived her of her husband violates the old maxim that "that reason is the life of the law," for there can be no reason in a rule which gives the stronger a right of action for an injury and denies it to the weaker. If the strong may maintain an action, the greater the reason why the weak may do so. If the *baron* may recover from one who entices away the *feme,* surely the same reason that supports the rule giving the former a right of action must give a like right to the latter. The reason is the same, but the degree is not, for the reason intensifies in power when invoked by the injured wife. The decisions which denied the wronged wife a right of action broke the line of consistency and marred the symmetry of the law. We have spoken of the decisions under the common law, but we do not feel called upon to discuss them at length; that has been ably done by the courts which have given the subject consideration. Bennett v. Bennett, 116 N. Y. 584; Lynch v. Knight, 9 H. L. Cas. 577; Foot v. Card, 58 Conn. 1. The decisions to which we have referred, and the authorities they adduce, prove beyond debate that even at common law the right of action for a personal wrong was in the wife. We assume, therefore, that the right of action for a wrong suffered by the wife was in her, and not in the husband. Any other conclusion is, indeed, logically inconceivable.

As the right of action for a personal injury was always in the wife, she is, of necessity, the real party in interest; and upon reason and principle she ought always to have been held to be the party entitled to prosecute the action for the invasion of that right. That it was not so held was owing to the power of the legal fiction that she and her husband were one, for from this fiction comes the stiff, unreasonable rule that in all actions she must join her husband. Equity, however, never gave full recognition to this technical doctrine. Our statute, years ago, gave the wife a right to sue alone, and thus—adopting the chancery doctrine and abrogating that of the common law—broke down the only position upon which it could with the slightest plausibility be asserted that she could not sue one who wrongfully took her husband from her, since upon the ground that she could not sue alone was rested the doctrine denying her a right to sue one who enticed away her husband. It was never as-

serted by the better considered cases nor by the abler text-writers that she did not herself possess the substantive right upon which the cause of action was founded. The reason that she could not maintain such an action was not that she was not the source of the substantive right, but that there was no remedy available to her for the vindication of the right. When the statute supplied the remedy by breaking down the barrier which stood between her and a recovery, it clothed her with full right to enforce her just and meritorious cause of action. * * * It seems to us very clear that, in view of the fact that true principle requires that a married woman should have a remedy for the vindication of a violated right, and that her rights and obligations have been so greatly increased and enlarged by the enabling statutes, she may have redress against one who wrongfully takes her husband from her. Every radical, express change in the law carries with it corresponding and incidental changes. These incidental changes are inseparable from the essential express changes, and are wrought by the Legislature. No part of the law can be expressly changed without causing incidental changes. To hold otherwise would be to frustrate the legislative purpose and break the law into isolated parts and disjointed fragments. It must follow from this doctrine that, when the statutes gave a married woman the right to sue alone, and changed her *status* so as to invest her with the general property rights of a citizen and impose upon her almost the same obligations as those resting upon all citizens free from disability, they clothed her with the right to appeal to the courts to redress the wrong inflicted by one who tortiously wrested from her the support, society, and affections of the husband. In adjudging, as we do, that this action can be maintained, we believe that we build on solid principle, and we know that we are sustained by able courts. * * * *

Judgment reversed.[1]

[1] In Clow v. Chapman, 125 Mo. 101, 28 S. W. 328, 46 Am. S. R. 468, with note, 26 L. R. A. 412 (1894); the court said; "But it is insisted on behalf of the defendant that the statutes of this state, before set out, do not confer upon the wife any new rights; that the personal rights mentioned in these statutes are the personal rights which she had at common law; that disabilities are removed, but no new rights are created, and, as she had no right of action at common law to remedy a wrong like the one in question, she has none under the statute law. There is, at first blush, some force in the argument, but upon consideration we consider it no more than adhering to a barren technicality. The statutes, when considered in their full scope and

This case is irreconcilable with minority view.

HOUGHTON v. RICE.

(174 Mass. 366; 54 N. E. 843.—1899.)

LATHROP, J. We do not think that the declaration in this case sets forth any cause of action at common law, if the husband had been the plaintiff instead of the wife; and no statute of this commonwealth gives the wife any greater right than the husband in cases of this nature. The acts charged are that the defendant did "ingratiate herself into the affections of the said William Houghton [the defendant's husband]; cause him incessantly to frequent her society, to give her various large sums of money, to execute to her various conveyances of property, to make large expenditures of money on her behalf, and to transfer to her, the said defendant, the courtesy and generosity, love and affection, previously bestowed by him upon the plaintiff as his said wife." It is then charged that by reason of these unlawful acts her husband ceased to have regard, respect, or affection for the plaintiff, and became cross, irritable, ill tempered, and penurious towards her, denying her suitable support and maintenance; was guilty of cruel and abusive treatment towards her; that his affections for her were wholly alienated from her, and her home and married state broken up and destroyed; that her husband, while living during certain months under the same roof with her, separated himself "virtually" from her, refused to live or cohabit with her as husband and wife, or to give her the benefit of his society, or to perform any of the duties due from him as her husband, but, on the contrary, for part of the year openly, and during the rest of the year secretly, lavished his property, society,

purpose, give the wife a separate legal existence, whereas before, her legal existence was considered merged into that of her husband, and for this reason and no other she could not maintain the action. New rights and new obligations necessarily arise from the changed condition, as incidents thereto. When she is given the sole control of her personal property, and the right to recover the same by her own suit, it must follow, as an incident, that she has the right to make contracts in respect of such property, though the statute may not, in terms, give her the right to make contracts in relation thereto. Full dominion over her property carries with it the power to dispose of such property, as a necessary incident. So, new personal rights and obligations flow to her because of the fact that she is given a separate and distinct legal existence. Besides all this, the words of the statute, 'personal rights,' are very comprehensive."

love, and affection upon the defendant. It is further alleged that "by reason of the matters and things hereinbefore set forth" the plaintiff has suffered great pain and distress of mind and body, has lost her home, and the society and comfort of her husband, etc. No adultery is alleged, and therefore the action is not for criminal conversation, where the allegation, when a husband sues, is that the defendant debauched and carnally knew the plaintiff's wife. The alienation of the wife's affection in such a case is a mere matter of aggravation, and the loss of the wife's consortium is the actionable consequence of the injury. Adultery was the essential fact to be proved, and, if this was not proved, the action failed. At common law, also, a husband could maintain an action against one who "persuaded, procured, and enticed his wife to continue absent and apart from him, and to secrete, hide, and conceal herself from him, whereby during the time she continued absent he lost her comfort and society, and her aid and assistance in his domestic affairs." He could also maintain an action against one for receiving his wife, and unlawfully harboring, concealing, and secreting her from him, and refusing to deliver her to him. In such cases adultery need not be alleged. We do not see anything in the substantive allegations which brings the case within any form of action known to the common law.

SIKES v. TIPPINS.

(85 Ga. 231.—1890.)

BLANDFORD, J. This was an action brought by Tippins against Sikes for criminal conversation with his wife. Under the charge of the court, the jury found a verdict for the plaintiff. The defendant moved for a new trial, which was refused, and this he alleges as error.

1. The defendant contended that Tippins condoned the adultery of his wife by living with her after he had found out the same. The court below held that such condonation did not bar the plaintiff of his right to recover, and in this we think the court was right. The court further held that it was a matter to be taken into consideration by the jury in mitigation of damages, and we think this hold-

ing was fully as favorable to the defendant as he had any right to expect. In the case of Verholf v. Van Houwenlengen, 21 Iowa, 431, the Supreme Court of Iowa held that condonation of the wife's offense of adultery, or forgiveness by the husband of the wife, did not bar the plaintiff's right to recover as against the adulterer. The husband may forgive the wife, and yet he may not forgive the author of her defilement, and of his loss, wrong, and injury. The defendant can no more defeat the action upon the ground of condonation than he could upon a plea of recrimination, or the ground that his accuser had been guilty of the same offense. See Bromley v. Wallace, 4 Esp. 237; 2 Greenl. Ev. § 56. See, also, the case of Sanborn v. Neilson, 4 N. H. 501, in which case it was said: "As to the circumstances that the plaintiff lived with his wife after he had knowledge of her want of fidelity to his bed, this may be evidence that he had forgiven her offense, but is clearly no evidence that he had forgiven the offense of the defendant. * * * This circumstance could be no answer to the action." See, also, 2 Hil. Torts, 515, and Smith v. Milburn, 17 Iowa, 30. While condonation would defeat the plaintiff in an action for divorce against his wife, it is no bar to an action against her seducer. See, also, the case of Stumm v. Hummel, 39 Iowa, 483. The court in that case said that if the plaintiff, after a full knowledge of his wife's infidelity, continued to live with her upon the same terms as before her crime, this would be no evidence to show that the plaintiff connived at her infidelity; and the plaintiff's forgiveness of his wife, and continuance of the marital relation, did not necessarily have the effect to establish connivance or assent. "The law will not hold a party remediless for an injury of this kind because, through the exercise of Christian virtue, the influence of family interest, or even in the want of what may be regarded as true manly spirit, he forgives an erring wife, and trusts in her reformation and promise of future good conduct and virtue." In Michael v. Dunkle, 84 Ind. 544, it was held that a husband may maintain an action of criminal conversation, although the intercourse took place after his final separation from his wife, and although a divorce had been granted to the wife for the cruelty of the husband before suit. We think these cases fully establish the proposition that the husband's living with the wife after knowledge of her criminal conversation does not bar the husband's right to recover against her seducers, and therefore there was no error in the charge of the court below on this subject.

3. We think the verdict of the jury is amply sustained by the evidence, and that the amount thereof ($1,400) was not excessive.

Judgment affirmed.[1]

KROESSIN v. KELLER.

(60 Minn. 372; 62 N. W. 488.—1895.)

COLLINS, J. This is an action brought by a married woman against one of her own sex to recover damages; following, in a general way, the common-law form of declarations in *crim. con.* A general demurrer to the complaint was overruled in the court below, and by this appeal we are required to determine whether such an action can be maintained; the right to recover being based solely on alleged adulterous acts between plaintiff's husband and the defendant. It is to be noticed here that it is not alleged that the defendant was the seducer of the husband, or that plaintiff has been deprived of his support; nor is it an action for enticing the husband away, or for inducing him to abandon or desert his wife. We are quite safe in saying that at common law no such action could have been maintained. The injured husband alone brought *crim. con.*, and he could sustain the action by simply showing adulterous intercourse. The grounds on which the right to recover was based are well stated in Cooley on Torts 224, and the principal elements were the disgrace which attached to the plaintiff as the husband of the unfaithful wife,—and no such disgrace has ever rested upon the wife, if there was one, of the guilty defendant,—and, of more importance, the danger that a wife's infidelity might not only impose on her husband the support of children not his own, but, still worse, cast discredit upon the legitimacy of those really begotten by him.

[1] In Tinker v. Colwell, 193 U. S. 473, 24 Sup. Ct. 505, (1904), holding that a judgment for damages for criminal conversation is excepted from the operation of a discharge in bankruptcy, it is declared: "We think it is made clear by these references to a few of the many cases on this subject that the cause of action by the husband is based upon the idea that the act of the defendant is a violation of the marital rights of the husband in the person of his wife, to the exclusion of all others, and so the act of the defendant is an injury to the person and also to the property rights of the husband. We think such an act is also a willful and malicious injury to the person or property of the husband, within the meaning of the exception in the statute."

Because of these elements, the man was always conclusively presumed to be the guilty party. In the eye of the law, the female could not even give her consent to the adulterous acts, and, as a result, it was no defense in this form of action that the defendant had been enticed into criminal conversation through the acts and practises of the woman. From this statement as to the grounds or elements constituting this action, it will be seen that the principal ones cannot possibly exist or be involved in a similar action brought by a wife. And what has been said about the unavailability of the defense that the defendant himself was the victim, and not the seducer, is suggestive of what the courts might have to hold to be the rule of pleading, and what they might have to inquire into, upon the trial of an action of this kind. Would it be held, following the old rule we have mentioned, and for which the reason seems well founded, that it was no defense for the female sued to allege and prove that she was the party seduced, and that the greater wrong and injury had been inflicted upon her, not upon the plaintiff's wife? or would the contrary rule prevail? But we need not consider the subject further, for a moment's reflection will suggest the remarkable results flowing from the adoption of either rule. * * * * Such actions would "seem to be better calculated to inflict pain upon innocent members of the families of the parties than to secure redress to the persons injured." The power to bring such actions would furnish wives "with the means of inflicting untold misery upon others, with little hope of redress for themselves."

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§ 2.—ABDUCTION AND SEDUCTION.

HUMPHREY v. POPE.

(Reported, *Supra*, p. 615.)

ANTHONY v. NORTON.

(60 Ks. 341; 56 Pac. 529.—1899.)

DOSTER, C. J. This was an action brought by Mrs. E. M. Norton, a widow, against O. L. Anthony, for damages for the seduction of her daughter, Turie Norton. Besides a denial of the imputed act,

the defense was that the daughter was of full age, and did not, as to her mother, stand in the relation of a servant to a mistress, and that no loss of service to the mother, as mistress, had resulted from the alleged wrong. The daughter was about 25 years old at the time of the seduction charged, and was clerking in a store. At and before that time she lived with her mother, as a part of the family, and occasionally performed some slight household services. The court, among other matters of law, instructed the jury as follows: "If you find from the evidence that the plaintiff is a widow, and the mother of Turie Norton, whom it is alleged that the defendant seduced, and that at the time of said seduction the said Turie Norton lived with her mother, and performed service for her (and you are instructed that the performance of any slight service is sufficient to satisfy the law in that regard), then plaintiff will be entitled to recover, if you find that the seduction was accomplished as alleged. That you may find that the said Turie Norton was in the service of the plaintiff, you need not find that a contract existed between them for such service. It will be sufficient if she lived with her mother when the seduction occurred, and took part in the housework. And such service need not be paid for, and no pay need be promised or expected." A request made by the defendant for the following instruction was refused: "I instruct you that the mere relation of mother and daughter will not permit a recovery by the former for the seduction of the latter."

The instruction given is in accord with the almost unanimous voice of the courts, and, if it were the only one to be considered, we should have no hesitation in approving it; but the request preferred by the defendant and refused by the court brings before us the question whether an action for seduction can be maintained upon the mere relation of parent and daughter alone,—especially where, as in this case, the daughter is of age, and lives with her parent, and constitutes a part of the family. Upon this question the holdings of the courts are uniform to the effect that an action for the seduction of a daughter, brought in the parental capacity alone, is not maintainable, except as allowed by statute. At common law the action is maintainable by the parent only in the capacity of master or mistress, and it must be in form an action for loss of the daughter's services as a servant. That the rules of the law should thus degrade the injured parent's right of action to one of mere compensation for the impaired ability of the daughter to perform labor,

and for the recovery of the expenses incident to such sickness as results from the wrong done, has been, throughout the course of judicial decision, a matter of regret among the judges. So grievously has this reproach upon the law been felt, that the courts quite a time ago began to sanction a wide latitude of evidence as to damages in such actions, until now the rule has become firmly established that notwithstanding the action must be, in form, for loss of services and expenses incurred in sickness, yet compensatory damages for parental and even general family shame and mortification may be recovered, together with an additional punitory sum for the flagrant wrong committed by the seducer. It will be profitable at this point to illustrate by quotations from the authorities the present liberal holdings of the courts upon this subject, and to note the extreme departure of the rule of proof from the rule of pleading, and also to note the lament of the judges over the arbitrary and technical theory which compelled the parent to disguise his action in the false and abhorrent form of a master's suit for loss of services. * * * *

Many more quotations like those above could be made from text-writers and reported decisions. The views of all legal authorities upon the subject are to the effect that the rule which requires a parent suing for the seduction of a daughter to plead loss of her services as his servant, but which obligates him to only nominal proof of the cause of the action stated, is an empty and senseless legal fiction, —a pretense and sham which does discredit to the law, and with which it were highly desirable to dispense. What seems to us a satisfactory definition of a fiction of law, though one admittedly broad, is that given in Maine, Anc. Law, p. 25. It is: "Any assumption which conceals, or affects to conceal, the fact that a rule of the law has undergone alteration, its letter remaining unchanged, its operation being modified. * * * The fact is that the law has been wholly changed. The fiction is that it remains what it always was." The substance of all the definitions of a legal fiction is that it is a pretense that the law as to a particular matter is different from what it really is. The legal fiction in actions by a parent for seduction is that he has lost the services of his daughter, and has been subjected to expense on her account, wherefore he sues for such loss and expense, and for them alone. The fiction assumes his right to recover for these, and these alone. The fact is that he has lost no services, and has been subjected to no expense; but the

law is that, notwithstanding his lack of loss and expense, he may nevertheless recover for the wounds to his parental feelings, and may mulct the seducer in punitive damages also. We say the law is that he may recover notwithstanding his lack of loss in his capacity as master. The courts make a pretense of holding him to proof of such loss, and make a pretense of withholding relief if he fails to make proof, but it is a pretense only. Proof of the very slightest kind of service will suffice. The service proved need be nothing more than nominal. It need not be actual or beneficial, and many of the courts hold that, where the daughter was not actually in the service of the parent, she nevertheless was, if a minor, constructively in his service, and that such constructive service was sufficient to uphold the right of action. It is a shameful pretense to hold that a daughter whose labors, for instance, merely consist in pouring the tea at her father's table and doing the honors of his household to his guests, is in his service as a servant, and that he may recover damages because of the loss of such labors through her seduction. Many of the courts have deplored the lack of legislation to enable them to dispense with the fiction in question, so as to allow them to bottom cases in theory, as well as in fact, upon the actual and meritorious ground upon which the damages are really awarded. If by this is meant legislation which in express terms abrogates the fiction of the relation of master and servant, we deny its necessity in this and other states which have adopted the reformed Code of Procedure. The Code was devised for the very purpose of dispensing with legal fictions and antiquated forms of action. Its spirit in this respect can be illustrated by a score or more of its provisions. Out of them one general rule of reform is collectible, and that is that the actual facts from which the claimed right of action is deducible must be stated. Nay, more, it is even expressed in some of the sections of the Code. "The distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing are abolished." Section 6. "There can be no feigned issues." Section 7. "The rules of pleading heretofore existing in civil actions are abolished." Section 85. "The petition must contain a statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition." Section 87. "All fictions in pleading are abolished." Section 116. If in fact a right of action is given to the parent, as such, for the seduction of the daughter; if in fact the injury done is

to the parent in that relation; if in law the courts take to themselves the right to probe beneath the thin veneering of the form of the action, as one for the loss of services, in order to reach the heart and core of the controversy and give damages for the actual injury committed; if these things are allowed and done, it cannot be that the liberal rules of the Code still require conformity to the fictitious and embarrassing formulas of the common law. Not only was it the design of the Code to simplify the rules of pleading by reducing to unity all the various forms of action existing at common law, and requiring the parties to state the actual facts of the controversy, but it contemplated the existence of the modern and enlarged ideas of justice as to matters of substantive right which had begun to prevail. To furnish a better medium for the working out of the newer and more equitable thought was equally its design. No relation in life has been more visibly affected by the humanizing influence of latter-day concepts of justice than has the domestic one. Originally the child was in the fullest sense the slave of its father. Indeed, the origin of slavery, according to the view of a most learned and deep-searching historian, was in the family circle. The child was born into slavery to its sire. * * * In Badgley v. Decker, 44 Barb. 577, and in Davidson v. Abbott, 52 Vt. 570, the daughters were 25 and 31 years, respectively, at the times of their seduction. The actions were held maintainable in these cases; and in the following ones they were likewise upheld, although the females had passed the period of minority: Sutton v. Huffman, 32 N. J. Law, 58; Wert v. Strouse, 38 N. J. Law, 185; Lamb v. Taylor, 67 Md. 85, 8 Atl. 760; Moran v. Dawes, 4 Cow. 412; Lipe v. Eisenlerd, 32 N. Y. 229; Villepigue v. Shular, 3 Strob. 462; Long v. Keigtley, 11 Ir. Law T. 77. Many other like cases might be cited, but these are sufficient to show that the minority of the daughter has never been held essential to the right of recovery by the parent. There exists no reason for distinguishing between cases of minority and of full age of the daughter, and granting a recovery in the former while denying it in the latter, merely because the legal fiction of services lost, upon which they were formerly both prosecuted, has been cleared out of the way, and the right of recovery placed in law as well as in fact upon its real ground. There is no magic in the passing of a daughter's eighteenth birthday anniversary, to relieve against parental solicitude and care, or parental anguish over her fall from virtue. At what time in the advancing age of a daughter

the feelings of parental mortification over such fall become sufficiently dulled, and the sense of parental responsibility sufficiently weakened, to reduce the damages to a nominal sum, or to deny them altogether, we need not concern ourselves. The law heretofore has set no time for the passing of parental feelings as to such matter into a condition of indifference, and we need not speculate as to it. Each case will depend upon its own particular facts, and as to such facts the jury is the judge.

The judgment of the court below will be affirmed. All the justices concurring.

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§ 3.—TORTS AGAINST THE MASTER.

NATIONAL PROTECTIVE ASSOCIATION v. CUMMING.

(Reported, *Supra*, p. 205.)

OLD DOMINION STEAMSHIP CO. v. McKENNA.

(Reported, *Supra*, p. 228.)

LUCKE v. CLOTHING CO.

(Reported, *Supra*, p. 231.)

WEBB v. DRAKE.

(Reported *Supra*, p. 227.)

GARRET v. TAYLOR.

(Croke, James, 567.—1620.)

Action on the case. Whereas he was a Freemason, and used to sell stones, and to make stone buildings, and was possessed of a lease for divers years to come of a stone-pit in Hedington, in the county of Oxford, and digged diver stones there, as well to sell as

to build withal; that the defendant, to discredit and to deprive him of the commodity of the said mine, imposed so many and so great threats upon his workmen, and all comers disturbed, threatening to mayhem and vex them with suits if they bought any stones; whereupon they all desisted from buying, and the others from working, etc.

After judgment by *nihil dicit* for the plaintiff, and damages found by inquisition to fifteen pounds, it was moved in arrest of judgment, that this action lay not; for nothing is alleged but only words, and no act nor insult: and causeless suits on fear are no cause of action.

Sed non allocatur: for the threatening to mayhem, and suits, whereby they durst not work or buy, is a great damage to the plaintiff, and his losing the benefit of his quarries a good cause of action: and although it be not shown how he was possessed for years, by what title, etc., yet that being but a conveyance to this action, was held to be well enough. And adjudged for the plaintiff.

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§ 4.—CONSPIRACY AS A TORT.

PLACE v. MINSTER.

(65 N. Y. 89.—1875.)

DWIGHT, C. The defendants urge that the judge at the trial should have nonsuited the plaintiff on the ground that there was no evidence to go to the jury to substantiate the charge made in the complaint. They urge this on two grounds. One is, that if the testimony of the plaintiff's witnesses were wholly credible, there is a clear departure in the testimony from the complaint, so that it is "improved in its entire scope and meaning." The other is, that the plaintiff's case rests on the testimony of an accomplice in the fraud, James Sherlock. And that he has so contradicted himself and was so influenced by fear or the hope of reward that his statements should not have been taken into account, but that the court should have rejected them as a matter of law. The first of these objections to the plaintiff's recovery requires an examination, to some extent of the testimony. * * * *

The testimony, assuming for the moment that full credit should be given to it, discloses that the defendants L. Minster and Kohn did not specifically direct the goods to be purchased in L. Minster's name. The plaintiff's own testimony is, that Sherlock told him that he had got orders from L. Minster (in whose name L. Minster and Kohn were doing business). He packed the goods by Sherlock's direction, and shipped them to L. Minster. The first order was sent 20th June, 1865, to the value of $2814, together with samples worth seventy dollars. On July 7th, Sherlock told the plaintiff that he was going to New York and wished more samples. He then said that he had another order for another lot of gloves, and they were directed and shipped as before to the amount of $2279, together with samples worth seventy-eight dollars. Other shipments were made on similar orders, down to the 4th or 5th of August. On the last of these days, he being in New York, received from Sherlock a check, signed L. Minster, for $1200. Shortly after August 11, 1865, the plaintiff saw L. Minster at his store, and asked him if he had paid Sherlock for the goods they had had of himself. Minster denied that they had bought any goods of the plaintiff, and said that they did not owe Sherlock anything.

On cross-examination the plaintiff testified that while he was in New York looking after the payment of his bill, he saw Minster in his store, but had no conversation with him about the goods, although he had then sent more than half of them. As far as is shown, not a word passed between him and the defendants as to their connection with the transaction, though the opportunities for such inquiry were at hand, and the sales were large enough to have attracted a seller's attention to their prompt adjustment, and payment by Sherlock was but partial and dilatory. It is true that the plaintiff testifies that bills were originally made out in L. Minster's name. These were, however, subsequently surrendered to Sherlock, on his representation that Minster would not pay unless bills were made out in Sherlock's name. This was done accordingly, although it is charged by the plaintiff that this was a part of the fraudulent conspiracy to obtain his goods without payment.

Without further detail of the testimony in this branch of the case, I think it clear that there was no specific understanding that the goods should be sold to L. Minster, as charged in the complaint. The most that can be said is, that there was an ambiguity of expression in the language of Sherlock, and that the plaintiff may

have supposed that there was an order on the part of Minster for the goods, though there was no direct statement that the goods were sold to him. All that was proved with any distinctness was that there was a conspiracy between Sherlock and L. Minster and Kohn, that the goods should be sold to Sherlock, and that he should go through the form of selling them to Minster & Kohn; that Sherlock should then abscond from the country and conceal himself in such a way that no testimony from him would be available, and that Minster & Kohn would then be able to represent that they bought the goods from Sherlock, and were in no respect liable to the plaintiff. Such a fraud would differ from the one charged in the complaint, in the fact that in that the conspiracy was alleged to be to sell to L. Minster, who was no member of the firm of Minster & Kohn, and who might deny the sale, while, as proved, Sherlock was to be the purchaser, and a subordinate contract was to be entered into as between him and the defendants.

That such a combination as this proved would amount to a conspiracy in law is deducible from the authorities. The essence of a conspiracy, so far as it justifies a civil action for damages, is a concert or combination to defraud or to cause other injury to person or property, which actually results in damage to the person injured or defrauded. All the necessary elements are present, according to the case made by the plaintiff. Page v. Parker, 43 N. H. 363; Wiggins v. Leonard, 9 Iowa, 195; Whitman v. Spencer, 2 R. I. 124; Walsham v. Stainton, 33 Law J. Ch. 68.

The act charged to result in a conspiracy may, in one aspect of the case, be innocent; in another it may be fraudulent. It will be necessary to consider the intent with which the act was done, so that the question will be peculiarly for the consideration of the jury. In Whitman v. Spencer, *supra*, a New York merchant purchased goods from a dealer in Providence, Rhode Island, to the amount of $6000, upon credit, and assigned them, without consideration, by a clear bill of sale, and the assignee removed the goods to Providence, where they would be free from attachment, and sold them there, saying that he intended to pay the creditors of the New York *merchant*, whose claims he had guaranteed, at the same time refusing to give a list of the creditors, such list being also refused by the vendor. It was held under this state of facts that the question whether there was a conspiracy or not depended solely on the intent. If the goods were taken to Providence with the *bona fide* in-

tent to sell them for the benefit of the creditors, there was no conspiracy. On the other hand, if there was an intent to secrete them, a conspiracy existed. The whole matter accordingly, it was considered, must go to the jury. In the case at bar, if Sherlock and the defendants contrived a plan whereby Sherlock was to get the title to the goods and then go through the form of sale to the defendants, and he was to abscond, so that the true history of the transaction could not be traced, and the defendants could get the goods without paying for them, the conspiracy would clearly be established. This would be so, though Sherlock was the only active participator in the fraudulent statements, and the defendants were wholly passive and silent as between themselves and the plaintiff. Page v. Parker, *supra*. It would seem to be a fraudulent conspiracy, even though Sherlock made no affirmative false statement to the plaintiff, but simply bought the goods with a preconceived design, as between himself and the defendants, not to pay for them, and to put out of the way all accessible evidence of their wrongful act. Such a fraudulent concealment of the true nature of a dealing, which on its face appears to be an ordinary sale, would be a fraud of a deep dye. Designing men cannot be allowed to put forth a supple tool to do their bidding, knowingly take the profits of a concocted wrong, remain silent, and go unwhipped of justice. The action for conspiracy is devised for just such cases. It reaches the silent partners in the transaction, and causes them to disgorge the profits of their hidden guilt. It is, thus, a highly remedial action, and in no respects to be discouraged, when resorted to in cases which fairly admit of its application. If the testimony in this cause most favorable to the plaintiff is true, the present is emphatically one of those cases to which the law should be applied with an unsparing hand, as the more active agent was plainly weak and vacillating and only upheld by the strong will and fortifying purpose of men of bolder design and firmer nerve.

The correctness of these views is distinctly sustained by the judgment in Moore v. Tracy, 7 Wendell, 229. In that case Tracy brought an action on the case for a conspiracy against W. and A. Moore, charging them with entering into a fraudulent combination with one J. Van Valkenburgh to the following effect: Van Valkenburgh was to buy and obtain of the plaintiff various goods under the pretense of a fair and *bona fide* purchase, but not intending to pay for the same, and the goods so obtained were to be delivered

into the possession of the defendants; Van Valkenburgh should then declare himself insolvent, and obtain a discharge under the insolvent act, and thereby defeat the collection of the plaintiff's demand. It was further charged that in pursuance of such conspiracy, Van Valkenburgh, under the pretense of a fair and honest purchase, obtained from the plaintiff certain articles of property, which were delivered to the defendants, or one of them, and by them disposed of to their own use. The facts alleged in the complaint having been proved at the trial, mainly by the testimony of the co-conspirator, Van Valkenburgh, the court, on appeal, held that the complaint disclosed a good cause of action, and affirmed a judgment rendered against the Moores. Pasley v. Freeman, 3 Term R. 56, was among other cases relied on. It was said: "In the case at bar the defendants reaped all the fruits of the fraud, but had no personal communication with the plaintiff. The declaration does not charge them with doing any act to induce the plaintiff to sell his goods to Van Valkenburgh, but he must be considered their agent, and his false and fraudulent representations (that he intended to and would pay for the goods, when it had previously been determined between him and the defendants that he should immediately put them into the hands of the defendants and take the benefit of the insolvent act) must be considered the acts and declarations of the defendants themselves." (P. 235.)

The parallel between the case just cited and that before the court is very close. In the present case there was no direct act between Minster and Kohn and the plaintiff. All the inducement to sell came from Sherlock. Yet if the testimony is true, those persons reaped the benefit of the fraud, and combined with him to commit it. His act must be deemed to be their act, and if the case of Moore v. Tracy is to be followed, they must respond to the plaintiff.[1]

Assuming, then, that the testimony as actually given in, estab-

[1] In Gunder v. Tibbitts, 153 Ind. 191, 55 N. E. 762 (1899), where the seducer of a girl and a physician were charged with conspiring to induce her to submit to abortion, which resulted in serious injury to her, the court held that each conspirator was legally responsible for the entire damages: "If each had acted independently, the plaintiff might have been compelled to pursue them separately, although the consequences of their acts united. But Kimball was the hand of Gunder in furthering Gunder's wrong. The consequences of the operation were intentionally intermingled by Kimball with the natural consequences of Gunder's sexual intercourse with plaintiff. When Gunder came to Kimball, the incident was not closed; and Kimball

lished a case of fraudulent conspiracy, did it differ so much from that alleged in the complaint that the variance is fatal under our practice? It seems to me that this difference does not present a case where the cause of action is "unproved in its entire scope and meaning," within the construction of the Code. (Sec. 171.) It is rather a variation of detail, or in the mode in which the fraud is carried into effect. The elements of fraud are present under either aspect of the case; there is a false representation, fraudulent intent, a preconceived design not to pay for the goods, a material statement and a reliance by the plaintiff upon it, and consequent injury to him in parting with his property. There is, undoubtedly, a variance, but no absolute departure from the original theory of the case. It will not be expedient to hold to a rule so rigorous as that for which the defendants contend, in cases of alleged fraud involving a conspiracy. The evidence is all in the breasts of the alleged conspirators. The plaintiff is groping in the dark. He obtains an imperfect version of the facts, sufficiently distinct, however, to torture one of the conspirators, ultimately to divulge them in full. These are drawn forth slowly and imperfectly, with attempts at concealment or with actual prevarication. He finally becomes so completely entangled in the meshes of a net of his own devising, that he finds but one way out. He cuts the cords and sets himself free. For the first time he tells a straightforward story, differing from the partial account on which the plaintiff framed his complaint. If all the elements of fraud are found in the case as proved, shall the complaint be dismissed, and the plaintiff be required to commence a new action? I think not. If the defendants feel themselves aggrieved they may make an affidavit under section 169 of the Code, showing that they have been misled to their prejudice; whereupon the court may allow them to amend on such terms as may be just, to enable them to prepare their defense according to the new phase which the plaintiff's case has assumed. Without such proof *aliunde*, or from extraneous sources, the variance is immaterial. Such is the rule of the Code, however it may depart from the doctrines of the common law. Catlin v. Gunter, 11 N. Y. 374, 375; Sharp v. Mayor of New York, 40 Barb. I have not been able, after

willingly joined in and helped on a wrong that was not completed,—a wrong that constituted, when completed, but one cause of action against Gunder. And so, if Kimball chose to come in at any stage, he, too, is liable for the whole; for the law will not undertake to apportion damages in such cases."

considerable examination, to find any authority to justify the court in the case at the bar in holding that there has been a failure of proof. * * *

Judgment affirmed.

WILDEE v. McKEE.

(101 Pa. St. 235.—1885.)

STERRETT, J. It cannot be doubted that trespass on the case for conspiracy to defame and thereby injure another in his particular avocation or business may be maintained whenever, in pursuance of such unlawful combination, means have been employed which tended to effectuate and, to a greater or less extent, accomplished the object of the conspirators. Mott v. Danforth, 6 Watts, 304–6; Haldeman v. Martin, 10 Barr. 369; Hood v. Palm, 8 Id. 237–9. In the last case it is said: "A conspiracy to defame by spoken words, not actionable, would be a subject of prosecution by indictment; and if so, then equally so a subject of prosecution by action, by reason of the presumption that injury and damage would be produced by the combination of numbers. * * * Defamation by the outcry of numbers is as resistless as defamation by the written act of an individual. The mode of publication is different; and it is for this reason that an action lies, at the suit of one who has been the subject of a conspiracy, whenever an indictment would lie for it." As an illustration of the principle, it is said an indictment lies for a conspiracy to vex or annoy another, for instance, to hiss a play or an actor, right or wrong; and hence, if the subject of such a conspiracy has been damnified thereby, a civil action may be maintained. Words which impute the want of integrity or capacity, whether mental, moral or pecuniary, in the conduct of a profession, trade or calling, in which the party unjustly accused is engaged, are actionable.

The only question suggested by this record is whether in the declaration, drafted by himself, the plaintiff has presented a case that fairly comes within the principles recognized by the foregoing authorities. If he has, the learned court erred in entering judgment for the defendants on the demurrer. In considering the question, it must be borne in mind that the defendants by demurring to the declaration, admit for present purposes the truth of all matters well

pleaded therein. It follows therefore that all matters recited in the declaration by the way of inducement, or charged therein to have been done or committed by the defendants, so far as they are not wholly irrelevant, must be accepted as true. Plaintiff avers in substance, that prior to the commission by the defendants of the several grievances thereinafter mentioned he had deservedly earned and enjoyed the confidence and esteem of his neighbors and acquaintances; that he was employed as a teacher by the Central Board of Missions of the Reform Presbyterian Church and engaged in "the business and profession of a teacher, whereby he acquired great gains, profits and advantages, and had always conducted himself in said business and profession with capacity, uprightness, obedience, probity," etc. He then charges *inter alia,* as follows: "Yet the defendants, well knowing the premises and greatly envying the happy state and condition of said plaintiff, but contriving and falsely and maliciously intending to injure him in his good name, fame and credit, and in his aforesaid business and profession, and to bring him into public scandal, infamy and disgrace with and amongst all his neighbors and other good and worthy citizens * * * and cause it to be suspected and believed that said plaintiff was not fit to be employed as a teacher, and that he was chargeable with insanity and monomania * * * and to vex, harass, oppress, impoverish and wholly ruin the said plaintiff in his aforesaid business and profession, and otherwise, * * * wickedly, unlawfully and maliciously, did agree, confederate, combine and form themselves into a conspiracy to defame."

It is conceded that the foregoing recitals and averments, without more are insufficient, but the plaintiff proceeds to charge "that the said defendants having conspired with their confederates as aforesaid, further contriving and intending as aforesaid, heretofore and in pursuance and execution of their said conspiracy, to wit, on the day and year aforesaid, at Allegheny county aforesaid, in a certain discourse which the said defendants had in the presence and hearing of divers persons, falsely and maliciously spoke and published of and concerning the said plaintiff, and of and concerning him in his said business and profession, and of and concerning his capacity and behavior while he was in the employ of the said Board * * * as aforesaid, the false, scandalous, malicious and defamatory words following, that is to say, "The man (meaning the said plaintiff) must not be right in his mind, thereby meaning that the said plain-

tiff was incapacitated for his said business and profession on account of insanity and monomania on the subject of adultery and whoredom." Coupled, as this count is, with the recitals and averments by which it is preceded, and followed by an averment of special damages, we cannot, in view of the authorities above referred to, say the charge therein contained is not actionable. We have no right to indulge in any speculation as to the answer the defendants may make to the charges contained in the declaration. They elected by their demurrer to take the position that the recitals and charge contained in the declaration, assuming them to be true, are insufficient to warrant a verdict and judgment in favor of plaintiff.

In this they were sustained erroneously as we think by the court below.[1]

[1] See Green v. Davies, 91 N. Y. Supp. 470, (1905), and valuable note thereon in 5 Columbia Law Rev. 233, from which the following extract: "As an indictable offense conspiracy was recognized at common law from the earliest times, State v. Buchanan (Md. 1821) 5 Har. & J. 317, and even though an act might not be indictable if done by an individual, a combination to do that act was held to be indictable. Timberly & Childe (1662) 1 Sid. 68; Rex. v. Journeyman Tailors (1721) 8 Mod. 11. The civil action of the early common law was under a writ of conspiracy; but this writ was allowable only in cases of conspiracy to have a man indicted for treason or for a felony punishable with death, 2 Selw. N. P. 806, and its operation was thus confined until the statute 21 Ed. I was enacted, which greatly enlarged the scope of private remedies against conspirators. The action under this statute was in the form of an action on the case. Under it civil actions were extended to all cases for which a criminal indictment would lie, provided the plaintiff had sustained actual damage (Archbold's N. P. 594), and the effect of the statute seems to have been thus to extend the scope of the old action and at the same time to have created a new action. Saville v. Roberts (1698) 1 Ld. Raymond 374. The new action might be brought against one or more defendants; 5 Vin. Abr. 416; and when brought against more than one, although there was still an allegation of conspiracy, the action seems to have taken the form of an action against joint tort feasors, rather than against conspirators and a single defendant might be found guilty. Skinner v. Gunton (1670) 1 Saund. 228; see 4 COLUMBIA LAW REVIEW 367. The authorities do not hold that no action for conspiracy proper could be brought under the statute. They seem to recognize that in practice this was done; Saville v. Roberts, supra; but it is probable that the greater likelihood of success under the new action for malicious prosecution caused the action for conspiracy to be less frequently sued."

PATNODE v. WESTENHAVER.

(114 Wis. 460; 90 N. W. 467.—1902.)

MARSHALL, J. * * * Counsel for appellant contends that: (e) "Respondent having sought to recover the amount of the $1,700 note by an action on contract, she ratified the transaction whereby she conveyed her property to Hulbert, precluding her from changing her position and maintaining an action sounding in tort for damages for a conspiracy." In submitting that proposition, counsel seem to have misconceived the nature of this action. The gist thereof is the damage suffered by a wrong which was distinct from other wrongs which were in a measure incidental thereto. No damages necessarily resulted from the mere sale of the real estate, nor by the delivery to respondent of the $1,700 note and mortgage for safe-keeping. His obligation to pay the debt represented by such securities was not affected by the wrongful destruction of them or by their wrongful retention by him. If in the execution of a fraudulent conspiracy the victim is induced to make several contracts or part with several things of value, it is by no means necessary for him to repudiate all of the incidental transactions in order to save the cause of action for damages against the members of the combine. The cause of action for the conspiracy in such circumstances is a possession by itself, a right to prosecute for the damages caused by the executed fraudulent combination. That cannot be split up. It must be enforced in a single suit. For example, if one is induced by a fraudulent conspiracy to sell two things of value for much less than they are reasonably worth, taking the promise of one member of the combine or all of them to pay the agreed consideration, which promise is thereafter breached, at least two distinct wrongs are involved, and two distinct causes of action accrue. The execution of the fraudulent conspiracy is one of them; the breach of the agreement to pay the stipulated consideration for the property is the other. The former cannot be split up and one action brought to recover the damages suffered as to one piece of property and a separate action brought for damages suffered as to the other. Neither is that action extinguished or waived by a suit upon the promise to pay. An action upon that promise, and one for damages for the loss brought about by the conspiracy—the difference between the sale price of the property and its reasonable value—are consistent with each other. They both ratify the sale.

In the situation of the parties here, neither the action to recover for the $1,700 note nor the action for damages suffered by respondent in the loss of the $1,500 note repudiates the sale of the realty. If we look at all the mischief as growing out of a single wrong, still it must be remembered that it is not the prosecution of two causes of action in such circumstances that is prohibited by law, but the splitting up of causes of action and the prosecution of inconsistent causes of action. It often happens that there are two causes of action for the same wrong, each standing for a distinct right. If they are inconsistent only one can be enjoyed. If they are consistent, all may be followed, if identity of parties does not exist, effecting a merger, though, one or either, proceeding to a satisfaction, might furnish complete redress, and at the point of satisfaction would extinguish the other. Barth v. Loeffelholtz, 108 Wis. 562, 84 N. W. 846; Clausen v. Head, 110 Wis. 405, 85 N. W. 1028. The right to redress for damages caused by a consummated conspiracy is distinct, so to speak, from the right to redress for wrongs caused in the progress of its execution. It may go against all the members of the combine, and there may be incidental transactions causing damage included in the claim against all, from which causes of action may arise against individual members of the combine. The prosecution of all for the conspiracy may proceed concurrently with the prosecution of one or more members of the combine liable for some element of the damage in another form of action, up to the point of satisfaction, at which point the element satisfied drops out, as there can be but one satisfaction for the same element of damage. Applying what has been said to this cause, in any view we may take of the $1,700 note, the prosecution of the action against Hulbert for that did not interfere with the prosecution against all the defendants for damages for the conspiracy. All the defendants might be found guilty in the latter action for damages, including the $1,700 note, and Hulbert be found liable in an action on the note, in which case one satisfaction covering such element would eliminate it from both actions.[1]

[1] Plaintiff sued Hulbert, Westerhouse and others for a conspiracy to defraud the plaintiff, by inducing her to deed certain real estate to Hulbert for $3,500; $300 of which was paid, and for the balance he gave her a note of $1,500, unsecured, and one of $1,700 secured by a mortgage on the property. Then the conspirators induced her to surrender the notes and mortgages to Hulburt, who destroyed them; refused to marry plaintiff as he had promised to do, and kept the real estate. One of the pleas in bar, was the pendency of an action previously commenced against Hulbert on the $1,700 note.

CHAPTER X.

DEFAMATION.

§ 1.—NATURE OF THE TORT.

SUN PRINTING & PUBLISHING ASS'N. v. SCHENCK.

(98 Fed. 925; 40 C. C. A. 168.—1900.)

WALLACE, Circuit Judge. * * * A defendant in an action of libel is responsible in damages for his own wrong, and not for the wrongful acts of others, who have published similar libels of the plaintiff; and the libels by the others neither add to nor detract from the wrong of the defendant. Consequently, it cannot be material whether these other wrongful acts have been committed previously or subsequently to that of the defendant, unless the proposition can be maintained that the reputation of the aggrieved party, having already been shattered by the previous libels, is less susceptible of further injury, and therefore that the evidence should be admitted as tending to reduce the damages. The answer to this proposition is that it is purely hypothetical, and is without any sanction in practical experience. No one can say which of many defamations has destroyed or materially impaired a reputation; or whether, but for the last, the earlier ones would have made any grave impression upon the opinion of the public. It would be idle to submit such an inquiry to a jury. Moreover, iteration, if long enough persisted in, will, at last accomplish its result; and every repetition of a slander adds to its malign effect. "It is the successive repetitions that do the work. A falsehood often repeated gets to be believed." Kenney v. McLaughlin, 5 Gray, 5. Proof of the bad character of the plaintiff, and, according to some of the authorities, proof of his bad reputation in respect to the matters which are charged in the libel, is competent. Such evidence is received because one whose character is bad is not entitled to the same measure of damages as one of unblemished fame. The principle, however, does not countenance the admission

of previous rumors of his guilt of the offenses charged in the libel. Wright v. Schroeder, 2 Curt. 548, Fed. Cas. No. 18,091; Root v. King, 7 Cow. 613; Inmán v. Foster, 8 Wend. 602; Peterson v. Morgan, 116 Mass. 350; Scott v. Sampson, 8 Q. B. Div. 491; Wolcott v. Hall, 6 Mass. 518. Evidence of previous publications by others of the libelous matters charged by the defendant is, upon principle clearly inadmissible in reduction, or, standing alone, in mitigation, of damages; and it was so held in Tucker v. Lawson, 2 Times Law Rep. 593, and Gray v. Publishing Co., 89 N. Y. St. Rep. 35, 55 N. Y. Supp. 35. It is inadmissible even when coupled with evidence that on such former occasions the plaintiff did not sue the publisher, or take any steps to contradict the charges made against him. Rex v. Holt, 5 Term R. 436; Ingram v. Lawson, 9 Car. & P. 333. The defense stricken out by the trial judge alleged only incompetent and irrelevant matters, and his ruling was correct. * * * *

It is not a defense to a libel or slander that the plaintiff has been guilty of offenses other than those imputed to him, or of offenses of a similar character; and such facts are not competent in mitigation of damages. The only tendency of such proof is to show, not that the plaintiff's reputation is bad, but that it ought to be bad. The strictness with which this rule is applied is shown in the ancient case of Smithies v. Harrison, 1 Ld. Raym. 727, and in the modern cases of Andrews v. Van Duzer, 11 Johns, 38, and Parkhurst v. Ketchum, 6 Allen, 406. It is also settled by law that only such facts are available in mitigation of damages as were known to the defendant at the time of the publication, and which might have influenced him in making the defamatory statements. Bush v. Prosser, 11 N. Y. 347; Hatfield v. Lasher, 81 N. Y. 246.

ATWATER v. MORNING NEWS CO.

(67 Conn. 504; 34 At. 865.—1896.)

HAMMERSLEY, J. * * * The defendant also claims that the judgment is erroneous because the court has not specially found the fact of the falsity of the libel. A malicious libel is presumed to be false unless its truth is affirmatively proved by the defendant. But, where the plaintiff relies upon the falsity to rebut evidence of the

defendant's good faith and lawful intention, he must then prove the falsity. So, it has correctly been held that, when the defendant's evidence tends to prove that the alleged libel was a privileged communication, the plaintiff cannot break the force of that evidence, and establish actual malice, by relying on the presumption of falsity. * * * The defendant, however, insists that the rule requiring the truth to be specially pleaded in justification is a rule of pleading, which has been changed by the practice act, and that the rules of court, in authorizing the use in an action of libel of complaint containing, in a separate paragraph, "Said publication was false and malicious," give to denial of that paragraph in the answer the effect of putting the plaintiff to the proof of the falsity of the publication. This would practically nullify the presumption that a defamatory charge is false,—a presumption clearly essential to any adequate protection under the law of libel. The universal principle underlying that law, and a careful study of its curious and complicated development in England, from the first statement of the principle by Bracton (de Actionibus, f. 140) to the present century, indicate that the necessity of pleading the truth in justification is more than a rule of pleading or evidence, and is involved in the very nature of the cause of action; and that such justification is not a direct denial of the cause of action, but a collateral matter, which, if established by the defendant, will bar the recovery that otherwise must follow the malicious injury, without questioning the truth or falsehood of the defamatory charge. At all events, it is clear that a law forbidding any recovery for injuries caused by a malicious libel, unless the person injured shall prove the falsity of the charge, would give immunity to a considerable class of dangerous libels, and radically change the existing law. The practice act has not produced such a change.

The form cited by the defendant does not purport to state a new cause of action, but the same cause in a different way. In the ordinary action of libel, claiming only general damages, the falsity of the libel is not a material fact on which the plaintiff relies in order to prove his case, and it has never been deemed necessary to allege it in the declaration. It has, however, uniformly been used as descriptive of every libel. Malice is a material fact, on which the plaintiff relies, and it has always been necessary that it should clearly appear from the declaration. Under the old practice, the allegation of malice and the descriptive term of "false" have been used in alleg-

ing the publication. Under the new practice, the publication is separately alleged, in order that it may be separately admitted or denied, and the allegation of malice, with the old descriptive term of "false," is made in a paragraph by itself. The falsity becomes a material fact, on which the pleader relies, where the defendant intends to justify, and must then be alleged in proper form as a special defense. Donaghue v. Gaffy, 53 Comm. 51, 2 At. 397.

CLUTTERBUCK v. CHAFFERS.

(1 Starkie, 471.—1816.)

This was an action for publication of a libel. The witness who was called to prove the publication of the libel (which was contained in a letter written by the defendant to the plaintiff) stated on cross-examination that the letter had been delivered to him folded up, but unsealed, and that without reading it, or allowing any other person to read it, he had delivered it to the plaintiff himself, as he had been directed.

Lord ELLENBOROUGH held that this did not amount to a publication which would support an action, although it would have sustained an indictment, since a publication to the party himself tends to a breach of the peace.

Verdict for the defendant.[1]

[1] In Shinglemeyer v. Wright, 124 Mich. 230, 82 N. W. 887 (1900), the court said: "3. In regard to the statement by defendant in the presence of the officer Henry, it was not a publication for which the law gives a remedy. She herself solicited the statement, and sent for the officer for the express purpose of having the defendant repeat the statement in his presence. It would not have been stated to him except by her invitation. She might have left the respondent's office. She waited some time for the officer to come, and then left, and, meeting the officer as she emerged from the building, came back with him for no other purpose than to ask him to repeat the statement in his presence. In Cristman v. Cristman, 36 Ill. App. 567, plaintiff was suspected of an assault with intent to murder. The defendant suspected the plaintiff, and so stated to an officer. Plaintiff took one King with him. and went to defendant's house. King asked her, in the presence of plaintiff, if she had any idea who did it, to which defendant replied: "There is only two mean enough to do it, and Johnnie is one of them. Johnnie is the only one that would do it, and he is the one that did do it." Held that

KIENE v. RUFF.

(1 Iowa, 482.—1855.)

ISBELL, J. The counsel for the defendant have insisted at great length, in this case, that the cause of action accrued in a foreign country, and that, therefore, it can be maintained only on the comity of nations; and that in order to do this, the plaintiff must show affirmatively, by the laws of the foreign country, that the acts charged to have been committed by the defendant, constitute an injury for which the courts of that country can afford redress. Several specifications of error, all going to this end, are relied upon; but we are unable to see that the questions involved in them arise upon the record. The declaration charges a writing and publication in Dubuque, in the State of Iowa, as well as a publication in Switzerland. All the evidence is not pretended to be before this court. In this state of the case, the presumption is in favor of the correctness of the finding, and hence we would be justified in presuming that proof of a publication in Dubuque was properly adduced. But we are not left to presumption. Enough of the evidence is before the court to show affirmatively that a publication in Iowa was proved. The testimony of Wildput, who is found by the referees as worthy of credit, shows satisfactorily that defendant furnished a copy of the libelous matter for him to transcribe. The transcript made by the witness was the copy forwarded from Dubuque to Switzerland. If this witness understood the German language, and that he did understand it, from the evidence before us we have no doubt, we fail to see why there was not a complete publication in Iowa. In the

plaintiff could not recover. Where one received a letter containing libelous statements, and himself read the letter to others, held that he could not recover. Sylvis v. Miller, 96 Tenn. 94, 33 S. W, 921. There is no difference in principle between reading a letter to another and soliciting a person to make a similar verbal statement. Where one sought from the superintendent of a railroad company a letter of recommendation for his friend, which letter was given, containing a statement that the person had left the service of the company during a strike, held that this was not publishing a libel. Railroad Co. v. Delaney, 52 S. W. 151, 45 L. R. A. 600. The following cases sustain the same doctrine: Bank v. Bader, 59 Minn. 329, 61 N. W. 328; Heller v. Howard, 11 Ill. App. 554; Fonville v. McNease, 1 Dud. (S. C.) 303; King v. Waring, 5 Esp. 13; Smith v. Wood, 3 Camp. 323; Haynes v. Leland, 29 Me. 233. Plaintiff repeatedly testified that she sent for the policeman to see if she did steal his wheel, and that she was going to make him prove it. The maxim, *Volenti non fit injuria*," applies.

case of Baldwin v. Elphinstone, in the exchequer, 2 Bl. 1037, in considering the question, after verdict, whether the allegation that the defendant printed and caused to be printed in the St. James Chronicle, was equivalent to a charge of having published the alleged libel, it was held unanimously by the justices and barons of the exchequer, that it was; and in doing so, they laid stress upon the words, caused to be printed, because they contemplated the calling in of a "third person as agent, to whom the libel must have been communicated." In the case before us, Wildput being procured to copy the libelous matter, was clearly an agent to whom the libelous matter was communicated.

In the case of The King v. Burdett, 5 Bac. Abr. 210, citing 3 Barn. & A. 717, the question of what shall amount to a publication was fully discussed, and it was held (Bailey, J., doubting) that a defendant, writing and composing a libel in one country, with intent to publish, and afterwards publishing it in another, may be indicted in either. And also that a delivery of a sealed letter, containing a libel, at the post office, is a publication there. But we are not required to go the length of this authority in sustaining the case before us. We conclude, therefore, that the assumption that the cause of action arose in a foreign country is not well founded, and that all the specifications of error based on this foundation must fail.

Again, it is insisted that plaintiff, in order to sustain his case, must show by proper evidence, that Spracher, the person to whom this libelous letter was directed in Switzerland, understood the German language In this we do not concur. It was necessary that the referees should be satisfied from the evidence that the language in which the libel was couched, was understood by some person to whom it came in Switzerland, to entitle plaintiff to any damage for a publication there. But we do not hold that it was necessary to show that Spracher understood the German language to entitle the plaintiff to recover.

It is also assigned as error, and insisted upon, that plaintiff, having failed to allege in his declaration, that the person to whom said letter was sent was a German by birth or education, or that he understood the German language, he was not entitled to produce the letter in evidence. If this specification of error is intended to be insisted upon in terms as stated, it is already sufficiently answered; for it was not essential to a recovery that "the person

to whom it was sent," in Switzerland, understood the German language, if there was a complete publication before sending it. Under the view we take of the case, the proof of a publication in Switzerland was necessary for the purpose of enhancing damage only. But counsel for defendant, in their argument, have taken a much wider range than is covered by the assignments of error. They have treated this assignment as though it were that the court erred by permitting the letter to be read in evidence, without an averment in the declaration, that some person to whom it came understood its meaning. To allow it to be read in evidence, under the state of the pleadings, we do not regard as an error. No variance is relied upon between the letter and the matter set out in the declaration. Certain words are averred to be written and published, and the writing is produced to prove them. It would be quite another question, whether proof might be adduced to show that those to whom the letter came understood it. But no question is raised as to the introduction of testimony to that end; but rather the objection is, that such evidence was not furnished. Again, it would be a different question, whether the declaration was demurrable for the want of this averment. But, although defendant demurred to the declaration for another cause, he failed to do so for this. Again, it is still another question, whether judgment should be arrested for the want of such averment.

While it has been held that if words are spoken in a foreign language, it will be good in arrest, that there is no averment that the hearers understood them, 1 Starkie on Slander, 361, and that a nonsuit was properly granted where the words were charged in the English language, and it turned out on proof that they were spoken in German, Warmouth v. Cramer, 3 Wend. 395; yet these were cases of verbal slander. There is a substantial difference in this respect, we apprehend, between such publishing of words, which must die with the breath that gives them utterance, in case they are not understood, and written slander, which lives, and continues to be susceptible of being understood, until the document containing it shall be destroyed. We are not prepared to hold, in the absence of direct authority, that in a civil case, such a publication as is charged in this case, to wit, to the injury of plaintiff, is after verdict insufficient. The substance of the declaration is, that defendant published the writing containing the words set forth in the declaration to plaintiff's injury. Having taken issue on this, without objection,

for the want of such averment, we think it is too late to set it up now, particularly as our statute provides that no variance, error or defect shall be deemed material, unless the court is satisfied that the objecting party will be prejudiced by disregarding it, or by allowing it to be amended. Code, sec. 1758. There can be no publication, unless the libelous matter is made to be understood. At least, then, after verdict, we think that the averment of publication should be held sufficient.

Finally, counsel have insisted that no injury accrued from this publication, because the character of Schinderhans is held in two estimations,—one good, and the other bad. We are satisfied that, without the matter comparing the plaintiff to this individual, the publication was clearly libelous; and from the tone of the whole letter there can be no two opinions among all who may read the communication, as to whether the writer intended the good or bad sense.

The judgment is affirmed.

GAMBRILL v. SCHOOLEY.

(93 Md. 48; 48 At. 730.—1901.)

PEARCE, J. * * * Bearing in mind these definitions and simple illustrations of what is and what is not publication, it will be seen that the argument that there has been no actionable publication in this case divides itself into two branches. The theory of the first branch is that, while there was in fact a physical or mechanical reception by the stenographer of the thoughts expressed by the appellant, such reception was instantaneous only, and merely sufficient for their reduction to written characters, but that there was no comprehension and no lodgment of their meaning in the brain of the recipient, who acted as a mere phonograph, and whose function in that regard was not a mental, but purely a mechanical process, so that there was no such perception as is requisite to constitute publication. This theory is both ingenious and subtle, but we cannot be persuaded it is sound. We cannot doubt that the dictation to Miss Willis, though taken down in stenographic characters, produced in her mind as full and complete perception of the thoughts

of the appellant as a slower dictation, for the purpose of reduction to ordinary characters, would have produced in the mind of one not a stenographer. If this were not so, there could be no assurance that there would be an accurate reproduction of the matter dictated, such as common knowledge gives assurance of from any skillful stenographer. A communication, therefore, to a stenographer, must be regarded precisely as a communication to an ordinary amanuensis, and as establishing all that is ordinarily necessary to constitute publication.

The second branch of the argument is that in view of the fact that Miss Willis was the private and confidential stenographer of the defendant, and in view of the almost universal employment in this country of such stenographers, and the necessity for such employment consequent upon the demands of business, a communication to such a stenographer should be made an exception to the general rule, and be held not to be an actionable publication. But we cannot adopt this view. Apart from any precedent or authority, we can perceive no good reason why such an exception should be made to the rule. Neither the prevalence of any business customs or methods, nor the pressure of business which compels resort to stenographic assistance, can make that legal which is illegal, nor make that innocent which would otherwise be actionable. Nor can the fact that the stenographer is under contractual or moral obligation to regard all his employer's communications as confidential alter the reason of the matter. This defense was made in Williamson v. Freer, L. R. 9 C. P. 393, where it was held that the unnecessary transmission by a post-office telegram of libelous matter which would have been privileged if sent in a sealed letter avoids the privilege; Lord COLERIDGE, C. J., saying, "Although the clerks are prohibited, under severe penalties, from disclosing the contents of telegrams passing through their hands, still there is a disclosure to them."

In Pullman v. Walter Hill & Co. (1891), 1 Q. B. 529, the exact question here presented was decided. There the letter containing the defamatory matter was dictated by the managing director of a corporation to a clerk, who took down the words in shorthand, and then wrote them out fully by means of a typewriting machine, and the letter thus written was copied by an office boy in a letterpress book. When it reached its destination it was, in the ordinary course of business, opened by a clerk of the plaintiff; and it was

held that the letter must be taken to have been published both to the typewriter and to the copypress boy, as well as to the plaintiff's clerk. Lord ESHER, M. R., in the course of his opinion, said: "I do not think that the necessities or the luxuries of business can alter the law of England. If a merchant wishes to write a letter containing defamatory matter, and to keep a copy of the letter, he had better make the copy himself." LOPES, L. J., said: "It is said business cannot be carried on if merchants may not employ their clerks to write letters for them in the ordinary course of business. I think the answer to this is very simple. I have never yet heard that it is in the usual course of a merchant's business to write letters containing defamatory statements. If a merchant has occasion to write such a letter, he must write it himself and copy it himself, or he must take the consequences." KAY, L. J., said: "The consequence of such an alteration in the law of libel would be this: that any merchant or solicitor who desired to write a libel concerning any person would be privileged to communicate the libel to any agent he pleased, if it was in the ordinary course of his business. That would be an extraordinary alteration of the law, and it would enable people to defame others to an alarming extent."

We were referred to Boxsius v. Goblet Frères (1894), 1 Q. B. Div. 843, as evincing a disposition to qualify the rule in Pullman v. Walter Hill & Co.; but we cannot discover such disposition, and if we could we should not be inclined to follow it. There the libelous letter was dictated by a solicitor, acting in behalf of and at the direction of his client, and copies were made as in the case mentioned. The court distinguished the case very clearly from Pullman v. Walter Hill & Co., holding, through two of the same judges, that the solicitor owed to his client the duty to act on his instructions, and that if the solicitor had communicated directly with the plaintiff the communication would have been privileged, and that he could discharge that duty, as he did other business of the office, in the ordinary way, without losing the privilege. But there was no question of privilege in Pullman v. Walter Hill & Co., and there is none here, as the appellant owed no duty in the matter to any one. The typewriter had no conceivable interest in hearing or seeing the letters, and there could be, therefore, no privilege between her and the appellant. * * * We think, for the reasons given above, that the defendant's first prayer was properly rejected.

Apart from the question of publication, the defendant's second

and third prayers raise the additional question whether, under the pleadings in this case, the action must not have been for slander, instead of libel, but we have no difficulty on this point. We have no doubt that the dictation of these letters to the stenographer was the publication of a slander, for which, if nothing further had been done by either, an action of slander could have been maintained, but we have no more doubt that the stenographic notes, the typewritten copy, and the letterpress copy constituted the publication of a libel, and that either slander or libel could be maintained, as the appellee should elect. This conclusion, we think, necessarily follows from what we have already said, without more formally stating the reasons; and our conclusion is not shaken by Mr. Odgers' criticism of the decision in Pullman v. Walter Hill & Co. upon the form of action, to be found on page 174 of his last edition. We therefore think the defendant's second and third prayers were properly rejected, not only for the reasons now given. but for those applicable to defendant's first prayer.

TAYLOR v. HEARST.

(107 Cal. 262; 40 Pac. 392.—1895.)

BELCHER, C. The defendant, W. R. Hearst, was sole proprietor of the daily newspaper published in San Francisco and known as "The Examiner." On January 10, 1892, there appeared in that paper an article charging, in substance, that J. W. Taylor had a contract with the city of San Francisco to supply basalt blocks for paving streets, at the rate of $45 per 1,000, and that he and one Henry Barron, who had been appointed keeper of the corporation yard near the foot of Sixth street, and whose duties required him to keep track of material belonging to the street department, had conspired together to cheat and defraud the city by getting fraudulent receipts for blocks never delivered; that 34 fraudulent receipts were obtained for 34 loads of blocks not delivered, and that afterwards Taylor swore to and filed a demand for payment on his contract, including the 34 bogus loads; that steps were then taken to prosecute him for perjury, but it was found that the demand had been sworn to before a clerk of the board of supervisors not author-

ized to administer an oath, and so the only thing for the city to do was to keep Mr. Taylor's demand until the bogus 34 loads were eliminated from it. The defendant had no knowledge of this article before or at the time of its publication, but his attention was called to it, and four days later a correction thereof was published in the paper in the following words:

"A CORRECTION.

"In an article which appeared in these columns on Sunday last referring to frauds on the public in connection with the furnishing basalt blocks to the city, the initials of J. N. Taylor were erroneously printed 'J. W.' J. W. Taylor, the contractor, had nothing to do with the transaction, and was in no way associated with Henry Barron, who was arrested at the same time as J. N. Taylor for conspiracy." * * * *

The article here complained of was libelous *per se*. It charged J. W. Taylor with dishonesty and criminal conduct, and, according to plaintiff's undisputed testimony, must have been understood by his friends as applying to him. It is true it was made to apply to him by mistake, but that did not justify or excuse the publication. As said in the note to McAllister v. Det. Free Press Co., 76 Mich. 338, 15 Am. St. Rep. 339, 43 N. W. 431, where the authorities on the subject of libel are very fully reviewed: "One who has published a libel on another cannot successfully resist the latter's action for redress by showing he did not intend to publish it, and that its publication was due to carelessness, inadvertence, or mistake. Hence it is not a sufficient defense that the publication of a libel resulted from an error in setting type." The "correction" or retraction published was properly pleaded and given in evidence, but it could operate only in mitigation of damages, and not as a full defense to the action.

FISH v. ST. LOUIS COUNTY PRINTING & PUBLISHING CO.

(102 Mo. App. 6; 74 S. W. 641.—1903.)

BLAND, P. J. * * * Defendant complains of the action of the court in striking out a part of its answer. The part stricken out stated the substance of Fish's articles published in the Argus and Watchman; alleged these articles to be libelous, and that they were published of and concerning some of the stockholders in the defendant corporation. Under the claim of privilege to answer these alleged libels, defendant claims justification in the publication of its article. It is certainly the law that one defamed by the publication of a libel has the right and privilege to defend himself by answer denying or explaining the libelous matter, and, if the explanation is pertinent and relevant to the first libel, it will be privileged, though it slanders the author of the prior publication. Odgers on Slander (2d Ed.) p. 175; Newell on Slander & Libel, §§ 120, 121; Brewer v. Chase, 121 Mich. 526, 80 N. W. 575, 46 L. R. A. 397, 80 Am. St. Rep. 527.

But this privilege extends no further, and if it be conceded that the articles published in the Argus and Watchman are libelous, and were concerning some of the stockholders in the defendant corporation, the defamation was of their personal honesty and conduct as county officials. The article published by defendant is not a denial or explanation of the Argus and Watchman articles, but is an irrelevant attack upon the personal and professional character of the plaintiff, and is therefore not privileged. But we think that the matter stricken out was proper to be considered in mitigation of the damages, on the theory that the Argus and Watchman publications provoked the publication of the alleged libel against plaintiff, and was also proper to be considered for the purpose of weakening the inference of malice. In Duncan v. Brown, 15 B. Mon. 186, it is said: "Circumstances of the provocation, which are insufficient to justify, may yet, by weakening the inference of malice, palliate the publication of slander or libel, and may operate to mitigate the damages to be recovered for it." And in Hartford v. State, 96 Ind. 461, 49 Am. Rep. 185, it is said that in criminal as well as in civil cases the fact that a libel was provoked by a prior libel to

which it replies may be shown, to mitigate the offense. Other cases holding the same doctrine are Shattuc v. McArthur (C. C.), 29 Fed. 136; Thomas v. Dunaway, 30 Ill. 373; Hotchkiss v. Lothrop, 1 Johns. 286; Knott v. Burwell, 96 N. C. 272, 2 S. E. 588; Massuere v. Dickens, 70 Wis. 83, 35 N. W. 349. The right to answer a libel by libel is analogous to the right to defend one's self against an assault upon his person. The resistance may be carried to a successful termination, but the means used must be reasonable. If they are unreasonable and excessive, the plea of *son assault demesne* will not be available, but the prior assault may be given in evidence in mitigation of damages. The first assault cannot be given in evidence in mitigation of damages if there is time between the first and second assault for the blood to cool. So a prior libel cannot be deemed to have provoked a libelous answer thereto if there was time between the two publications for the blood to cool, nor will the first afford evidence of mitigation. Quinby v. Minnesota Tribune Co., 38 Minn. 528, 38 N. W. 623, 8 Am. St. Rep. 693; Gould v. Weed, 12 Wend. 12; Beardsley v. Maynard, 4 Wend. 336. In the Quinby Case it was held doubtful, where a libel charging a physician with malpractice was published the day after a libel commenting on a brutal jest, if the first libel mitigated the second, as there was time for the blood to cool. In Beardsley v. Maynard it was denied that any provocation by a newspaper libel the day before furnished mitigation for a libel that was not in reply to the former; and in Gould v. Weed it was held that, after a lapse of two weeks, a publication in reply was too late to afford a presumption that it was published under the influence of passion produced by the prior libel.

It would not be competent for the court, under our law, which makes the jury the judge of both the law and facts in cases of libel and slander, to declare, as a matter of law, in what time the publication of a libel would not provoke the publication of a libelous reply. A newspaper libel is put into general circulation. The paper does not reach the eye of all of its patrons at the same hour, nor always on the same day, and it seems to us that during the period of its circulation the libel would be a continuing provocative to anger. And we think, also, that if the libel concerned the action of officials having in charge a matter of large public interest, as the granting or refusing to grant a franchise to a railroad company, and its tendency was to excite inquiry and discussion among the people

where the paper circulated, so long as this discussion should continue and the libel continue to be circulated it would continue to be an irritant, calculated to provoke anger, and that the question of whether or not there had been time for the blood to cool is one peculiarly for the jury. While the matter stricken out of the answer was insufficient to show privilege to the defendant to publish the libel, it was matter that defendant might plead in rebuttal of any inference of malice and in mitigation of damages, and we think the court erred in striking it out.[1]

ELMER v. FESSENDEN.

(151 Mass. 359.—1890.)

Tort for slander. The declaration alleged that the defendant, who was a physician, falsely informed certain employees of the plaintiff, who was a manufacturer of whipsnaps from silk thread, that the silk thread which was furnished them by the plaintiff, and which they were compelled to manipulate in their work, contained arsenic, as a result of which information they ceased to work for the plaintiff; and that the plaintiff had suffered in the loss of their services certain specified damage in his business. The answer contained a general denial, and also alleged that whatever words were spoken were privileged.

HOLMES, J. * * * 2. It is argued that the defendant was answerable for the repetition of such a story as this, on the ground that any one who heard it was morally bound to repeat it to the workmen. The general rule, that a man is not liable for a third

[1] In Brewer v. Chase, 121 Mich. 526, 80 N. W. 575, 46 L. R. 397, 80 Am. S. R. 527 (1899), the court said: "The case that goes the furthest towards supporting the defendant's claim is Goldberg v. Dobberton, 46 La. Ann. 1303, 16 South. 192. In the syllabus it is said: 'The interchange of opprobrious epithets and mutual vituperation and abuse will justify a judge in approving a verdict for the defendant, although the slanderous words were proved; and a verdict rendered in such a case will not be disturbed by the supreme court.' Copious notes upon this subject will be found in 28 Lawy. Rep. Ann. 721, from which it will be seen that the Louisiana case is exceptional. Numerous authorities are cited which are not repeated here."

person's actionable and unauthorized repetition of his slander, is settled. Hastings v. Stetson, 126 Mass. 329, 331; Shurtleff v. Parker, 130 Mass. 293, 296. If the repetition is privileged, the question becomes somewhat different. It is true that the fact that the sufferer has no action against one person is not a sufficient reason for giving him one against another, even if otherwise he is remediless. But the case is withdrawn from the principle applied in many instances, that the law will look no further back than to the wrongdoer, who is the proximate cause of the consequence complained of. Clifford v. Atlantic Cotton Mills, 146 Mass. 47, 49. We need not now decide that, when the original slander was uttered under such circumstances that the privileged repetition manifestly was to be expected, the damage caused by the repetition could not be recovered for to the same extent as if the defendant had repeated the slander himself. Compare Derry v. Handley, 16 L. T. (N. S.) 263; Parkins v. Scott, 1 H. & C. 153; Keenholts v. Becker, 3 Denio, 346, 352; Terwilliger v. Wands, 17 N. Y. 54, 59; Fowles v. Bowen, 30 N. Y. 20, 22; Titus v. Sumner, 44 N. Y. 266; Bassell v. Elmore, 48 N. Y. 561.

In the case before us, it did not appear that the repetition was privileged. Assuming that the story heard by Anna M. Brackett was the one set in motion by the defendant, there was no evidence as to how it came from him to her. He may have uttered it to a stranger, and it may have passed through twenty mouths before it reached the plaintiff's workmen. We do not know whether those who repeated it believed it, or whether any one of them made it in pursuance of a supposed duty, or, if a stranger and a volunteer under any circumstances could make out a case of privilege, whether such circumstances existed. See Shurtleff v. Parker, 130 Mass. 293; Joannes v. Bennett, 5 Allen, 169, 171; Krebs v. Oliver, 12 Gray, 239, 243; Waller v. Loch, 7 Q. B. D. 619, 621; Davies v. Snead, L. R. 5 Q. B. 608, 611. It cannot be contended that any one who heard the story was under such a moral obligation to repeat it broadcast without further inquiry, that the defendant must be taken to have contemplated and authorized the repetition until at last it reached the plaintiff's workmen.

Exceptions sustained.[1]

[1] In Schoepflin v. Coffey, 162 N. Y. 12, 56 N. E. 502 (1900), the court said: "The mere speaking of words in the presence of the third persons that are not actionable *per se* would, at most, amount to a mere slander, even if special damages were alleged, and their repetition or the printing and publi-

FOLWELL v. PROVIDENCE JOURNAL CO.

(19 R. I. 551, 37 At. 6.—1896.)

STINESS, J. The defendant is sued for printing a libel upon the plaintiff in its newspaper, the Providence Daily Journal. The case was tried to a jury, and damages were assessed against the defendant in the sum of $2,300. The defendant set up no justification for the libel, but offered evidence in mitigation of damages simply, and it now petitions for a new trial on the grounds of erroneous rulings and excessive damages. * * * The doctrine that a slander could be justified by giving the name of the author originated in Northampton's Case, 12 Coke, 134. But this rule related to a justification simply. It was but a *dictum*, published after the death of Lord Coke, which for a time was followed with some hesitation; but it has long since ceased to be regarded as law. Odger, Sland. & L. *162; Starkie, Sland. & L. (Wendell's Ed. 1852) c. 14, and note. Numerous cases, in which the question has arisen, hold that the giving of the name of an informant is no justification, but that the publisher of a libel or a slander is liable, even though he is not the author of it. He may do as much damage in spreading it as if he

cation of them by the independent act of a third party would not render the person speaking them responsible therefor. It is too well settled to be now questioned that one who utters a slander, or prints and publishes a libel, is not responsible for its voluntary and unjustifiable repetition, without his authority or request, by others over whom he has no control, and who thereby make themselves liable to the person injured, and that such repetition cannot be considered, in law, a necessary, natural, and probable consequence of the original slander or libel. Newell, Defam. 245; Moak, Underh. Torts, 145; McGregor v. Thwaites, 3 Barn. & C. 35. The remedy in such a case would be against the party who printed and published the words thus spoken, and not against the one speaking them, as a person is not liable for the independent, illegal acts of third persons in publishing matters which may have been uttered by him, unless they are procured by him to be published, or he performed some act which induced their publication. Ward v. Weeks, 7 Bing. 211; Olmsted v. Brown, 12 Barb. 657. The repetition of defamatory language by another than the first publisher is not a natural consequence of the first publication, and therefore the loss resulting from such repetition is not generally attributable to the first publisher. This rule is based upon the principle that every person who repeats a slander is responsible for the damage caused by such repetition, and that such damage is not the proximate and natural consequence of the first publication of the slander. Bassell v. Elmore, 48 N. Y. 564."

had started it. When, therefore, there is a plea of justification, evidence of the origin of the slander is not admissible for any purpose, because it is not a justification in itself, and a plea of the truth of the words spoken or written is such a reaffirmation of them as to make their origin immaterial in the measure of damages. In view of this development of the law, it is but natural that expressions are to be found which may be taken to imply that the name of the author must be given at the time of the publication. They are generally used in opposition to the doctrine of Northampton's Case; as in Dole v. Lyon, 10 Johns. 447, KENT, C. J., says: "It is not sufficient that the printer, by naming the author, gives the party aggrieved an action against him." This is intended to apply to the exculpation of the defendant. * * * But, where no justification is claimed, we know of no case which expressly holds that the fact of information from another cannot be shown, for what it is worth, upon the question of damages. Indeed, there seems to be a common agreement, starting with the idea of a full justification, that one who inadvertently repeats a slander is not equally liable with one who maliciously invents it, unless he reaffirms it by a plea of its truth. The object of giving the name at the time, that it might appear in exculpation that one was not stating a fact as from himself, has passed away, as also the notion that it was for the purpose of letting the plaintiff know who the author was, so that he could sue him, since all who take part in spreading a slander are liable. The source and character of the information, however, are of consequence in considering a defendant's conduct. Everybody knows that telegraphic items in a newspaper are not composed in the office of the paper. It is as plain as though it was so written that they come from some person in another place. This much may be taken for granted. * * *

New trial granted.

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§ 2.—LIBEL AND SLANDER. (A.)—DIFFERENCES.

POLLARD v. LYON.

(91 U. S. 225.—1875.)

Mr. Justice CLIFFORD. Words both false and slanderous, it is alleged, were spoken by the defendant of the plaintiff; and she sues in an action on the case for slander to recover damages for the

injury to her name and fame. Controversies of the kind, in their legal aspect, require pretty careful examination; and, in view of that consideration, it is deemed proper to give the entire declaration exhibited in the transcript, which is as follows:

"That the defendant, on a day named, speaking of the plaintiff, falsely and maliciously said, spoke and published of the plaintiff the words following, 'I saw her in bed with Captain Denty.' That at another time, to wit, on the same day, the defendant falsely and maliciously spoke and published of the plaintiff the words following, 'I looked over the transom-light and saw Mrs. Pollard,' meaning the plaintiff, 'in bed with Captain Denty'; whereby the plaintiff has been damaged and injured in her name and fame, and she claims damages therefor in the sum of ten thousand dollars."

Whether the plaintiff and defendant are married or single persons does not appear; nor is it alleged that they are not husband and wife, nor in what respect the plaintiff has suffered loss beyond what may be inferred from the general averment that she had been damaged and injured in her name and fame.

Service was made, and the defendant appeared and pleaded the general issue; which being joined, the parties went to trial; and the jury, under the instructions of the court, found a verdict in favor of the plaintiff for the whole amount claimed in the declaration. None of the other proceedings in the case, at the special term, require any notice, except to say that the defendant filed a motion in arrest of judgment, on the ground that the words set forth in the declaration are not actionable, and because the declaration does not state a cause of action which entitles the plaintiff to recover; and the record shows that the court ordered that the motion be heard at General Term in the first instance. Both parties appeared at the General Term, and were fully heard; and the court sustained the motion in arrest of judgment, and decided that the declaration was bad in substance. Judgment was subsequently rendered for the defendant, and the plaintiff sued out the present writ of error.

Definitions of slander will afford very little aid in disposing of any question involved in this record, or in any other, ordinarily arising in such a controversy, unless where it becomes necessary to define the difference between oral and written defamation, or to prescribe a criterion to determine, in cases where special damage is claimed, whether the pecuniary injury alleged naturally flows from the speaking of the words set forth in the declaration. Different

definitions of slander are given by different commentators upon the subject; but it will be sufficient to say that oral slander, as a cause of action, may be divided into five classes, as follows: (1) Words falsely spoken of a person which impute to the party the commission of some criminal offense involving moral turpitude, for which the party, if the charge is true, may be indicted and punished. (2) Words falsely spoken of a person which impute that the party is infected with some contagious disease, where, if the charge is true, it would exclude the party from society; or (3) Defamatory words falsely spoken of a person, which impute to the party unfitness to perform the duties of an office or employment of profit, or the want of integrity in the discharge of the duties of such an office or employment. (4) Defamatory words falsely spoken of a party which prejudice such party in his or her profession or trade. (5) Defamatory words falsely spoken of a person, which, though not in themselves actionable, occasion the party special damage.

Two propositions are submitted by the plaintiff to show that the court below erred in sustaining the motion in arrest of judgment, and in deciding that the declaration is bad in substance: (1) That the words set forth in the declaration are in themselves actionable, and consequently that the plaintiff is entitled to recover without averring or proving special damage. (2) That if the words set forth are not actionable *per se*, still the plaintiff is entitled to recover under the second paragraph of the declaration, which, as she insists, contains a sufficient allegation that the words spoken of her by the defendant were, in a pecuniary sense, injurious to her, and that they did operate to her special damage.

Certain words, all admit, are in themselves actionable, because the natural consequence of what they impute to the party is damage, as if they import a charge that the party has been guilty of a criminal offense involving moral turpitude, or that the party is infected with a contagious distemper, or if they are prejudicial in a pecuniary sense to a person in office or to a person engaged as a livelihood in a profession or trade; but in all other cases the party who brings an action for words must show the damage he or she has suffered by the false speaking of the other party. Where the words are intrinsically actionable, the inference or presumption of law is that the false speaking occasions loss to the plaintiff; and it is not necessary for the plaintiff to aver that the words alleged amount to the charging of the described offense, for their actionable quality

is a question of law, and not of fact, and will be collected by the court from the words alleged and proved, if they warrant such a conclusion.

Unless the words alleged impute the offense of adultery, it can hardly be contended that they impute any criminal offense for which the party may be indicted and punished in this district; and the court is of the opinion that the words do not impute such an offense, for the reason that the declaration does not allege that either the plaintiff or the defendant was married at the time the words were spoken. Support to that view is derived from what was shown at the argument, that fornication as well as adultery was defined as an offense by the provincial statute of the 3d of June, 1715, by which it was enacted that persons guilty of those offenses, if convicted, should be fined and punished as therein provided. Kilty's Laws, c. xxvii. secs. 2, 3. Beyond all doubt, offenses of the kind involve moral turpitude; but the second section of the act which defined the offense of fornication was, on the 8th of March, 1785, repealed by the legislature of the State. 2 Kilty, c. xlvii. sec. 4. Sufficient is remarked to show that the old law of the province defining such an offense was repealed by the law of the State years before the Territory, included within the limits of the city, was ceded by the State to the United States; and inasmuch as the court is not referred to any later law passed by the State, defining such an offense, nor to any act of Congress to that effect passed since the cession, our conclusion is that the plaintiff fails to show that the words alleged impute any criminal offense to the plaintiff for which she can be indicted and punished. Suppose that is so: still the plaintiff contends that the words alleged, even though they do not impute any criminal offense to the plaintiff, are nevertheless actionable in themselves, because the misconduct which they do impute is derogatory to her character, and highly injurious to her social standing.

Actionable words are doubtless such as naturally imply damage to the party; but it must be borne in mind that there is a marked distinction between slander and libel, and that many things are actionable when written or printed and published which would not be actionable if merely spoken, without averring and proving special damage. Clements v. Chivis, 9 Barn. & Cress. 174; McClurg v. Ross, 5 Binn. 219.

Unwritten words, by all or nearly all the modern authorities, even if they impute immoral conduct to the party, are not actionable in

themselves, unless the misconduct imputed amounts to a criminal offense, for which the party may be indicted and punished. Judges as well as commentators, in early times experienced much difficulty in extracting any uniform definite rule from the old decisions in the courts of the parent country to guide the inquirer in such an investigation; nor is it strange that such attempts have been attended with so little success, as it is manifest that the incongruities are quite material, and, in some respects, irreconcilable. Nor are the decisions of the courts of that country, even of a later period, entirely free from that difficulty.

Examples both numerous and striking are found in the reported decisions of the period last referred to, of which only a few will be mentioned. Words which of themselves are actionable, said Lord HOLT, must either endanger the party's life, or subject him to infamous punishment; that it is not enough that the party may be fined and imprisoned, for a party may be fined and imprisoned for common trespass, and none will hold that to say one has committed a trespass will bear an action; and he added at least the thing charged must "in itself be scandalous." Ogden v. Turner, 6 Mod. 104.

Viewed in any proper light, it is plain that the judge who gave the opinion in that case meant to decide that words, in order that they may be actionable in themselves, must impute to the party a criminal offense affecting the social standing of the party, for which the party may be indicted and punished.

Somewhat different phraseology is employed by the court in the next case to which reference will be made. Onslow v. Horne, 3 Wil. 186. In that case, DEGRAY, Ch. J., said the first rule to determine whether words spoken are actionable is, that the words must contain an express imputation of some crime liable to punishment, some capital offense or other infamous crime or misdemeanor, and that the charge must be precise. Either the words themselves, said Lord KENYON, must be such as can only be understood in a criminal sense, or it must be shown by a colloquium in the introductory part that they have that meaning; otherwise they are not actionable. Holt v. Scholefield, 6 Term. 694. Separate opinions were given by the members of the court in that case; and Mr. Justice LAWRENCE said that the words must contain an express imputation of some crime liable to punishment, some capital offense or other infamous crime or misdemeanor; and he denied that the meaning of words not

actionable in themselves can be extended by an innuendo. 4 Co. 17*b*. Prior to that, Lord MANSFIELD and his associates held that words imputing a crime are actionable, although the words describe the crime in vulgar language, and not in technical terms; but the case does not contain an intimation that words which do not impute a crime, however expressed, can ever be made actionable by a colloquium or innuendo. Colman v. Godwin, 3 Doug. 90; Woolnoth v. Meadows, 5 East, 463.

Incongruities, at least in the forms of expression, are observable in the cases referred to, when compared with each other; and when those cases, with others not cited, came to be discussed and applied in the courts of the States, the uncertainty as to the correct rule of decision was greatly augmented. Suffice to say, that it was during the period of such uncertainty as to the rule of decision when a controversy bearing a strong analogy to the case before the court was presented for a decision to the Supreme Court of the State of New York, composed, at that period, of some of the ablest jurists who ever adorned that bench. Allusion is made, in the opinion given by Judge SPENCER, to the "great uncertainty in the law upon the subject," and, having also adverted to the necessity that a rule should be adopted to remove that difficulty, he proceeds, in the name of the court, to say, "In case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject the party to an infamous punishment, then the words will be in themselves actionable;" and that rule has ever since been followed in that State, and has been very extensively adopted in the courts of other States. Brooker v. Coffin, 5 Johns. 190; 1 Am. Lead. Cas. (5th Ed.) 98. When he delivered the judgment in that case he was an associate judge of the court, Chancellor KENT being the chief justice, and participating in the decision. Fourteen years later, after he became chief justice of the court, he had occasion to give his reasons somewhat more fully for the conclusion then expressed. Van Ness v. Hamilton, 19 Johns. 367.

On that occasion he remarked, in the outset, that there exists a decided distinction between words spoken and written slander; and proceeded to say, in respect to words spoken, that the words must either have produced a temporal loss to the plaintiff by reason of special damage sustained from their being spoken, or they must convey a charge of some act criminal in itself and indictable as such, and subjecting the party to an infamous punishment, or they must

impute some indictable offense involving moral turpitude; and, in our judgment, the rule applicable in such a case is there stated with sufficient fullness, and with great clearness and entire accuracy.

Controverted cases involving the same question, in great numbers, besides the one last cited, have been determined in that State by applying the same rule, which, upon the fullest consideration, was adopted in the leading case,—that in case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject the party to an infamous punishment, then the words will be in themselves actionable. Attempt was made by counsel in the case of Widrig v. Oyer, 13 Johns. 124, to induce the court to modify the rule by changing the word "or" into "and;" but the court refused to adopt the suggestion, and repeated and followed the rule in another case reported in the same volume. Martin v. Stillwell, 13 id. 275. See, also, Gibbs v. Dewey, 5 Cowen, 503; Alexander v. Dewey, 9 Wend. 141; Young v. Miller, 3 Hill, 22; in all of which the same rule is applied. Other cases equally in point are also to be found in the reported decisions of the courts of that State, of which one or two more only will be referred to. Bissell v. Cornell, 24 Wend. 354. In that case, the words charged were fully proved; and the defendant moved for a nonsuit, upon the ground that the words were not in themselves actionable; but the circuit judge overruled the motion, and the defendant excepted. Both parties were subsequently heard in the Supreme Court of the State, NELSON, Ch. J., giving the opinion of the court, in which it was held that the words were actionable; and the reason assigned for the conclusion is, that the words impute an indictable offense involving moral turpitude.

Defamatory words to be actionable *per se*, say the court, must impute a crime involving moral turpitude punishable by indictment. It is not enough that they impute immorality or moral dereliction merely, but the offense charged must be also indictable. At one time, said the judge delivering the opinion, it was supposed that the charge should be such, as, if true, would subject the party charged to an infamous punishment; but the Supreme Court of the State refused so to hold. Widrig v. Oyer, 13 Johns. 124; Wright v. Page, 3 Keyes, 582. Subject to a few exceptions, it may be stated that the courts of other States have adopted substantially the same rule, and that most of the exceptional decisions are founded upon local statutes defining fornication as a crime, or providing that words

imputing incontinence to an unmarried female shall be construed to impute to the party actionable misconduct. Without the averment and proof of special damage, says SHAW, Ch. J., the plaintiff, in an action on the case for slander, must prove that the defendant uttered language the effect of which was to charge the plaintiff with some crime or offense punishable by law. Dunnell v. Fiske, 11 Met. 552. Speaking of actions of the kind, PARKER, Ch. J., said that words imputing crime to the party against whom they are spoken, which, if true, would expose him to a disgraceful punishment, or imputing to him some foul and loathsome disease which would expose him to the loss of his social pleasures, are actionable, without any special damage; while words perhaps equally offensive to the individual of whom they are spoken, but which impute only some defect of moral character, are not actionable, unless a special damage is averred, or unless they are referred, by what is called a colloquium, to some office, business or trust which would probably be injuriously affected by the truth of such imputations. Chaddock v. Briggs, 13 Mass. 252. Special reference is made to the case of Miller v. Parish, 8 Pick. 385, as authority to support the views of the plaintiff; but the court here is of the opinion that it has no such tendency. What the court in that case decided is, that whenever an offense is imputed, which, if proved, may subject the party to punishment, though not ignominious, but which brings disgrace upon the party falsely accused, such an accusation is actionable; which is not different in principle from the rule laid down in the leading case,—that if the charge be such that, if true, it will subject the party falsely accused to an indictment for a crime involving moral turpitude, then the words will be in themselves actionable.

Early in her history, the legislature of Massachusetts defined the act of fornication as a criminal offense, punishable by a fine, and which may be prosecuted by indictment; and, if the person convicted does not pay the fine, he or she may be committed to the common jail or to the house of correction. None of the counts in that case contained an averment of special damage; but the court held that, inasmuch as the words alleged imputed a criminal offense which subjected the party to punishment involving disgrace, the words were actionable; and it is not doubted that the decision is correct. Exactly the same question was decided by the same court in the same way twenty-five years later. Kenney v. Laughlin, 3 Gray, 5; 1 Stat. Mass. 1786, 293. Other State courts, where the

act of fornication is defined by statute as an indictable offense, have made similar decisions; but such decisions do not affect any question involved in this investigation. Vandcrip v. Roe, 23 Penn. St. 182; 1 Am. Lead. Cas. (5th Ed.) 103; Simons v. Carter, 32 N. H. 459; Sess. Laws (Penn. 1860) 382; Purdon's Dig. 1824, 313. That the words uttered import the commission of an offense, say the court, cannot be doubted. It is the charge of a crime punishable by law, and of a character to degrade and disgrace the plaintiff, and exclude her from society. Though the imputation of crime, said BIGELOW, J., is a test whether the words spoken do amount to legal slander, yet it does not take away their actionable quality if they are so used as to indicate that the party has suffered the penalty of the law, and is no longer exposed to the danger of punishment. Krebs v. Oliver, 12 Gray, 242; Fowler v. Dowdney, 2 M. & Rob. 119.

Courts affixed to words alleged as slanderous their ordinary meaning; consequently, says SHAW, Ch. J., when words are set forth as having been spoken by the defendant of the plaintiff, the first question is, whether they impute a charge of felony or any other infamous crime punishable by law. If they do, an innuendo, undertaking to state the same in other words, is useless and superfluous; and, if they do not, an innuendo cannot aid the averment, as it is a clear rule of law that an innuendo cannot introduce a meaning to the words broader than that which the words naturally bear, unless connected with proper introductory averments. Alexander v. Angle, 1 Crompt. & Jer. 143; Goldstein v. Foss, 1 Younge & Jer. 146; Carter v. Andrews, 16 Pick. 5; Beardsley v. Tappan, 2 Blatch. 588.

Much discussion of the cases decided in the Supreme Court of Pennsylvania is quite unnecessary, as we have the authority of that court for saying that the leading cases establish the principle, that words spoken of a private person are only actionable when they contain a plain imputation, not merely of some indictable offense, but one of an infamous character, or subject to an infamous or disgraceful punishment; and that an innuendo cannot alter, enlarge or extend their natural and obvious meaning, but only explain something already sufficiently averred, or make a more explicit application of that which might otherwise be considered ambiguous to the material subject-matter properly on the record, by the way of averment or colloquium. Gosling v. Morgan, 32 Penn. St. 275; Shafter v. Kinster, 1 Binn. 537; McClurg v. Ross, 5 id. 218; Andreas v. Koffenheafer, 3 S. & R. 255.

State courts have in many instances decided that words are in themselves actionable whenever a criminal offense is charged, which, if proved, may subject the party to punishment, though not ignominious, and which brings disgrace upon the complaining party; but most courts agree that no words are actionable *per se* unless they impute to the party some criminal offense which may be visited by punishment either of an infamous character, or which is calculated to affect the party injuriously in his or her social standing. Buck v. Hersey, 31 Me. 558; Mills v. Wimp, 10 B. Monr. 417; Perdue v. Burnett, Minor, 138; Demarest v. Haring, 6 Cow. 76; Townsend on Slander, sec. 154; 1 Wendell's Stark. on Slander, 43; Redway v. Gray, 31 Vt. 297. Formulas differing in phraseology have been prescribed by different courts; but the annotators of the American Leading Cases say that the Supreme Court of the State of New York, in the case of Brooker v. Coffin, appear "to have reached the true principle applicable to the subject;" and we are inclined to concur in that conclusion, it being understood that words falsely spoken of another may be actionable *per se* when they impute to the party a criminal offense for which the party may be indicted and punished, even though the offense is not technically denominated infamous, if the charge involves moral turpitude, and is such as will affect injuriously the social standing of the party. 1 Am. Lead. Cas. (5th Ed.) 98.

Decided support to that conclusion is derived from the English decisions upon the same subject, especially from those of modern date, many of which have been very satisfactorily collated by a very able text-writer. Addison on Torts (3d Ed.) 765. Slander, in writing or in print, says the commentator, has always been considered in our law a graver and more serious wrong and injury than slander by word of the mouth, inasmuch as it is accompanied by greater coolness and deliberation, indicates greater malice, and is in general propagated wider and farther than oral slander. Written slander is punishable in certain cases, both criminally and by action, when the mere speaking of the words would not be punishable in either way. Villiers v. Mousely, 2 Wils. 403; Saville v. Jardine, 2 H. Bl. 532; Bac. Abr. Slander, B.; Keiler v. Sessford, 2 Cr. C. C. 190. Examples of the kind are given by the learned commentator; and he states that verbal reflections upon the chastity of an unmarried female are not actionable, unless they have prevented her from marrying, or have been accompanied by special damage; but, if they

are published in a newspaper, they are at once actionable, and substantial damages are recoverable. 2 Bl. Com. 125, n. 6; Janson v. Stuart, 1 Term. 784.

Comments are made in respect to verbal slander under several heads, one of which is entitled defamatory words not actionable without special damage; and the commentator proceeds to remark that mere vituperation and abuse by word of mouth, however gross, is not actionable unless it is spoken of a professional man or tradesman in the conduct of his profession or business. Instances of a very striking character are given, every one of which is supported by the authority of an adjudged case. Lumby v. Allday, 1 Crompt. & Jer. 301; Barnet v. Allen, 3 H. & N. 376. Even the judges holding the highest judicial stations in that country have felt constrained to decide, that to say of a married female that she was a liar, an infamous wretch and that she had been all but seduced by a notorious libertine, was not actionable without averring and proving special damage. Lynch v. Knight, 9 H. of L. Cas. 594. Finally, the same commentator states that words imputing to a single woman that she gets her living by imposture and prostitution, and that she is a swindler, are not actionable, even when special damage is alleged, unless it is proved, and the proposition is fully sustained by the cases cited in its support. Welby v. Elston, 8 M. G. & S. 142; Addison on Torts (3d Ed.) 789; Townsend on Slander, secs. 172 and note, 516–518.

Words actionable in themselves, without proof of special damage, are next considered by the same commentator. His principal proposition under that head is that words imputing any indictable offense are actionable *per se* without proof of any special damage, giving as a reason for the rule that they render the accused person liable to the pains and penalties of the criminal law. Beyond question, the authorities cited by the author support the proposition, and show that such is the rule of decision in all the courts of that country having jurisdiction in such cases. Heming v. Power, 10 Mees. & Wels. 570; Alfred v. Farlow, 8 Q. B. 854; Edsall v. Russell, 5 Scott N. R. 801; Brayne v. Cooper, 5 Mees. & Wels. 250; Barnet v. Allen, 3 H. & N. 378; Davies v. Solomon, 41 Law Jour. Q. B. 11; Roberts v. Roberts, 5 B. & S. 389; Perkins v. Scott, 1 Hurlst. & Colt. 158.

Examined in the light of these suggestions and authorities cited in their support, it is clear that the proposition of the plaintiff, that

the words alleged are in themselves actionable, cannot be sustained.[1]

Concede all that, and still the plaintiff suggests that she alleges in the second paragraph of her declaration that she "has been damaged and injured in her name and fame;" and she contends that that averment is sufficient, in connection with the words charged, to entitle her to recover as in an action of slander for defamatory words with averment of special damage. Special damage is a term which denotes a claim for the natural and proximate consequences of a wrongful act; and it is undoubtedly true that the plaintiff in such a case may recover for defamatory words spoken of him or her by the defendant, even though the words are not in themselves actionable, if the declaration sets forth such a claim in due form, and the allegation is sustained by sufficient evidence; but the claim must be specially set forth, in order that the defendant may be duly notified of its nature, and that the court may have the means to determine whether the alleged special damage is the natural and proximate consequence of the defamatory words alleged to have been spoken by the defendant. Haddan v. Scott, 15 C. B. 429. Whenever proof of special damage is necessary to maintain an action of slander, the claim for the same must be set forth in the declaration, and it must appear that the special damage is the natural and proximate consequence of the words spoken, else the allegation will not entitle the plaintiff to recover. Vicars v. Wilcox, 8 East, 3; Knight v. Gibbs, 1 Ad. & Ell. 46; Ayre v. Craven, 2 id. 8; Roberts v. Roberts, B. & S. 389. When special damage is claimed, the nature of the special loss or injury must be particularly set forth, to support such an action for words not in themselves actionable; and, if it is not, the defendant may demur. He cannot demur in

[1] In Cushing v. Hederman, 117 Ia. 687, 91 N. W. 940 (1902), the court said: "Appellant contends that there is no evidence that plaintiff was unmarried at the time of the acts imputed to her, and that, therefore, the language used did not constitute slander *per se;* but the distinction which is urged as between words imputing unchastity to a married woman and like words with reference to a single woman is not founded on any authority which has been brought to our attention. It is true that the doctrine recognized in this state that words imputing unchastity to a woman are actionable *per se* is contrary to authorities in many of the states. See, however, as supporting the Iowa rule, Barnett v. Ward, 36 Ohio St. 107, 38 Am. Rep. 561; Reitan v. Goebel, 33 Minn. 151, 22 N. W. 291; Smith v. Minor, 1 N. J. Law, 16. But the Iowa rule covers words imputing unchastity to a woman whether married or single. Cleveland v. Detweiler, 18 Iowa, 299; Haynes v. Ritchey, 30 Iowa, 76, 6 Am. Rep. 642."

the case last cited; and COCKBURN, Ch. J., remarked that such an action is not maintainable, unless it be shown that the loss of some substantial or material advantage has resulted from the speaking of the words. Addison on Torts (3d Ed.) 805; Wilby v. Elston, 8 C. B. 148.

Where the words are not in themselves actionable, because the offense imputed involves neither moral turpitude nor subjects the offender to an infamous punishment, special damage must be alleged and proved in order to maintain the action. Hoag v. Hatch, 23 Conn. 590; Andres v. Koppenheafer, 3 S. & R. 256; Buys v. Gillespie, 2 Johns. 117. In such a case, it is necessary that the declaration should set forth precisely in what way the special damage resulted from the speaking of the words. It is not sufficient to allege generally that the plaintiff has suffered special damages, or that the party has been put to great costs and expenses. Cook v. Cook, 100 Mass. 194. By special damage in such a case is meant pecuniary loss; but it is well settled that the term may also include the loss of substantial hospitality of friends. Moore v. Meagher, 1 Taunt. 42; Williams v. Hill, 19 Wend. 306. Illustrative examples are given by the text-writers in great numbers, among which are loss of marriage, loss of profitable employment, or of emoluments, profits or customers; and it was very early settled that a charge of incontinence against an unmarried female, whereby she lost her marriage, was actionable by reason of the special damage alleged and proved. Davis v. Gardiner, 4 Co. 16 b, pl. 11; Reston v. Pomfreicht, Cro. Eliz. 639. Doubt upon that subject cannot be entertained; but the special damage must be alleged in the declaration, and proved; and it is not sufficient to allege that the plaintiff "has been damaged and injured in her name and fame," which is all that is alleged in that regard in the case before the court. Hartley v. Herring, 8 Term. 133; Addison on Torts, 805; Hilliard on Remedies (2d Ed.) 622; Beach v. Ranney, 2 Hill, 309.

Tested by these considerations, it is clear that the decision of the court below, that the declaration is bad in substance, is correct.

Judgment affirmed.[1]

[1] In Haynes v. Clinton Printing Co., 169 Mass. 512, 48 N. E. 275 (1897), Holmes, J. said: A libel does not need the categorical certainty of an indictment at common law. An insinuation may be as actionable as a direct statement, and nothing is better settled than that a defendant cannot escape liability merely by putting the insinuation or statement into the mouth of somebody else. Hurley v. Publishing Co., 138 Mass. 334, 336; Stevens v. Hart-

§ 2B.—CIVIL LIBEL.

BRADT v. NEW NONPAREIL CO.

(109 Ia. 449: 79 N. W. 122.—1899)

DEEMER, J. The only question presented by this appeal is this: May a mother recover damages for a libel of and concerning an adult son, published after his decease? The damages sought to be recovered in this action are for humiliation, shame, and mental anguish of the mother caused by an alleged libelous publication concerning her deceased son, George Bradt. The publication, which is set forth in the petition, is undoubtedly libelous *per se*. But the pivotal question is, may plaintiff recover damages therefor? Section 5086 of the Code makes it a crime to maliciously blacken or villify the memory of one who is dead, by a libelous publication tending to scandalize or provoke his surviving relatives or friends; and there is no doubt that for the publication set out in plaintiff's petition defendant was subject to a criminal prosecution, provided the article was published without sufficient justification. But is it liable civilly to the mother of the deceased? She does not sue in a representative capacity, and, if she had, she could not recover, for it is manifest no injury was done to the estate of her deceased son. It seems that contemptuous demeanor towards a corpse was, by the Roman law, an insult to the heir of the deceased, and that action could lie therefor. Dig. 47, 10, 11. The rule that an heir may recover for a libel of one deceased does not seem to have gained a foothold in this country, and we know of no principle that will sustain such an action. There was nothing in the article which tended in any manner to reflect on the plaintiff, and her sufferings were of the same kind as that produced by publication upon any

well, 11 Metc. (Mass.) 542, 549, 550; Watkin v. Hall, L. R. 3 Q. B. 396; Odgers, Sland. & L. (2d Ed.) 166, 266, 267, 313. The cases cited by the defendant to show that words of mere suspicion are not actionable are cases of slander, and have but a qualified, if any, application to libel. In libel, it is enough, whatever the form, that the manifest tendency of the words is seriously to hurt the plaintiff's reputation, and the point at which words will be held to have that tendency is reached earlier than in slander. Clark v. Binney, 2 Pick. 113, 116; Tillson v. Robbins, 68 Me. 295; King v. Lake, Hardr. 470; Bradley v. Methwyn, 2 Selw. N. P. (11th Ed.) 1046; Thorley v. Lord Kerry, 4 Taunt. 355, 3 Camp. 214.

of the other relatives or close friends of deceased. To permit a recovery in this case would allow the mother of any person libeled to bring suit in her own name for the consequential damages done to her feelings, and the death of the person libeled would be a wholly irrelevant matter; for the suffering is in kind the same whether the person libeled be living or dead. We have not been cited to an authority, and, after a diligent search, we have been unable to find one, which authorizes a recovery in such a case. On the other hand, the following cases hold such action will not lie: Sorenson v. Balaban (Sup. Ct.) 42 N. Y. Supp. 654; Wellman v. Sun Publishing Co., 21 N. Y. Supp. 577, 66 Hun, 331.

The trial court correctly sustained the demurrer, and its judgment is affirmed.

BORNMANN v. STAR CO.

(174 N. Y. 212: 66 N. E. 723.—1903)

VANN, J. The legal effect of the publication complained of is the same as if the plaintiff had been the only physician referred to, and, in view of the answer which mentions him by name, as if reference had been made to him *eo nomine*.[1]

The article described the plaintiff as a "physician," and said, in substance, that he was a jackass in the guise of a doctor. It further charged that the medical school which gave him his diploma as a doctor of medicine graduated him, a brute, "to care for us in sickness," and a ghoul, "to mutilate us when dead." It criticised, by suggestion, the educational system which permitted such a savage to retain his diploma, and urged the public authorities to arrest him as a degenerate graduate, and to give him at least an installment of his deserts. It spoke of him as one of the doctors employed to care for the patients in a charity hospital, who hauled from his coffin, while still in the hospital awaiting burial, the dead body of a patient, "white-headed, and withered and worn with life's battles," and strung him up by the neck in front of Dr. Stewart's residence,

[1] The publication referred to "12 young physicians of the house staff" of a certain hospital, but named none of them. Plaintiff was one of the twelve referred to. (Ed.)

"a grisly object swinging in the wind," and danced around it, and thus insulted both the living and the dead.

Too much of the article was true, but all was not; yet the plaintiff was besmirched by it all, not as an individual, but as a physician. It does not say simply that Alfred Bornmann was guilty of the outrage, or even that Doctor Bornmann was thus guilty, but it coils its sentences around him as a physician by describing him as a jackass disguised as a doctor, a brute graduated to care for the sick, a ghoul graduated to mutilate the dead, a degenerate graduate deserving arrest and punishment, a savage unworthy to retain his diploma, who, although engaged as a doctor to treat the patients in a hospital, maltreated the corpse of an old man, who had died there, by stringing it up in a public place and dancing around it.

It is not the individual, but the doctor, the savage with a diploma, the brutish, ghoulish, degenerate graduate, who is held up to public scorn by the strong language of the article. The plaintiff was attacked in his professional capacity, because he was denounced as a physician, with a diploma, but unworthy of it, a graduate guilty of an atrocious wrong, a doctor, but nevertheless a jackass, a savage, a brute, a ghoul, and a degenerate. While on duty as a doctor at the hospital he is said to have invaded its deadhouse and inflicted a monstrous indignity upon the body of a gray-haired old man who had been his patient but a short time before. His calling as a physician permeates the editorial, and appears in nearly every sentence. As I read the entire publication, a degenerate graduate means a degenerate doctor, and an institution that graduates brutes and ghouls means one that turns out doctors who are brutes and ghouls like the plaintiff.

Was it error, under these circumstances, for the trial court to hold, as matter of law, and the Appellate Division to unanimously sanction the holding, that the plaintiff was assailed in his professional capacity? The article imputed to a physician the ignorance of a jackass, the brutality of a savage, and the fiendishness of a ghoul, which presumptively injured his professional reputation. Is a jackass in the guise of a doctor, a savage unfit to retain his diploma as a physician, a graduate of a medical school who is a brute, a ghoul, and a degenerate, fit to properly practice his profession? Did not such charges necessarily reflect upon his capacity and tend to lessen public confidence in him as a professional man? "If the words be of probable ill consequence to a person in a trade, or profession, or office,"

they are actionable *per se*. Is such a physician as the plaintiff is said to be worthy of employment? Would people be apt to engage him to enter their households and care for their sick? Did not the language used "touch" the plaintiff, that is, affect him, in his special character, more than it would a person in any other profession or calling?

To say of a minister that he is immoral, of a lawyer that he is an ignoramus, a drunkard, or a cheat, of an architect or a teller of a bank that he is crazy, of a physician that he is a humbug, or a quack, or a butcher, or a blockhead, or a quacksalver, or an empiric, or a mountebank, or that he is no scholar, or that his diploma is worthless, has been held actionable *per se*, as touching the vocation. Krug v. Pitass, 162 N. Y. 154, 56 N. E. 526, 76 Am. St. Rep. 317; Moore v. Francis, 121 N. Y. 199, 204, 23 N. E. 1127, 8 L. R. A. 214, 18 Am. St. Rep. 810; Cruikshank v. Gordon, 118 N. Y. 178, 183, 23 N. E. 457; Sanderson v. Caldwell, 45 N. Y. 398, 402, 6 Am. Rep. 105; White v. Carroll, 42 N. Y. 161, 1 Am. Rep. 503; Tarleton v. Lagarde, 46 La. Ann. 1368, 16 South. 180. 26 L. R. A. 325, 49 Am. St. Rep. 353; Clifford v. Cochrane, 10 Ill. App. 570; Cawdry v. Highley, Cro. Car. 270; Peard v. Jones, Cro. Car. 382; Allen v. Eaton, 1 Roll. Abr. 54; Doddart v. Haselfoot, 1 Viner's Abr. S, a, pl. 12; Southee v. Denny, 1 Exch. 196; Cooke's Law of Defamation, 18; 18 Am. & Eng. Ency. (2d Ed.) 961.

The case before us comes within the principle of the cases cited, and others referred to therein. While the plaintiff, in view of his own testimony, deserves little sympathy, he is entitled to his legal rights, and to have such character as he had left after his foolish conduct protected from destruction by defamation.

The judgment should be affirmed, with costs.

SMITH v. BRADSTREET CO.

(63 S. C. 525; 41 S. E. 763.—1902)

POPE, J. When this action came on for trial before his honor Judge BUCHANAN and a jury, upon reading the complaint the defendant interposed a demurrer in writing on the ground that such complaint fails to "state facts sufficient to constitute a cause

of action, in that the words set out in the complaint, and alleged to have been uttered by the defendant, are not actionable nor libelous *per se*, nor such as, without more, necessarily imply damage to the plaintiff; that it is therefore necessary for the plaintiff not only to prove, but also in his complaint to specifically allege, the special damage which he claims to have suffered, and this he has failed to do." After argument the court said: "I do not think the complaint sets out enough here. I do not think it sets out special damages at all. I do not think it is fairly inferable from the complaint that the plaintiff has any cause of action at all. I therefore grant the motion." * * * * *.

It was held by the court of last resort in the case of Davis v Ruff, Cheves, at pages 19 and 20, 34 Am. Dec. 584: "The general rule is, as stated in 1 Saunders, 242, note 3, that, when the words 'are only actionable because they are spoken of a tradesman, the plaintiff must aver and prove that the words were spoken in relation to his trade.' But to this rule there is one plain, well-recognized exception,—that, where the words are such as affect a man's credit, then it is neither necessary to aver nor to prove that they were spoken in reference to the particular trade or business which the party was pursuing." In the case at bar the complaint sets out: "That on the 9th day of February, 1898, said defendant, the Bradstreet Company maliciously composed and published concerning the plaintiff, who was then, and had long previously thereto been, a reputable merchant in good standing and credit in the city of Charleston, state aforesaid, carrying on successfully the business of a pharmacist and druggist in the city of Charleston, state aforesaid, the following false and defamatory matter, under the head of 'Record News,' in said publication of February 9, 1898, known as 'Sheet of Changes and Corrections,' to wit: 'South Carolina, Charleston, Smith, Frank—Druggist, Chattel mortgage, $1,900.' That said publication was false, and that by reason thereof this plaintiff's business was injured, and this plaintiff was injured in his business reputation, and in his good name and credit as a merchant, to his damage $1,995." As will be seen from the complaint itself, the defendant was alleged to be conducting at the time of the publication of said "Record Items" a mercantile agency in the city of New York, and throughout the United States and Canada; also having offices in the city of Charleston, S. C.; and it is also alleged that defendant's said business consisted then, and

to himself for that cause upon such a trial there, he would not dare to risk a trial in that county. Assuming this to be the true meaning of the publication, the inquiry follows, whether such language with such meaning and application is libelous within the rules of law applicable to the action for libel. The counsel for the defendants, although they did not admit on the argument that even such language could be considered libelous within their understanding of what they denominated the modern definition of libel, yet undertook to show by argument and authority that at the period when the late Chancellor KENT, and Chief Justice SPENCER, and their associates, held seats in this court the rule in regard to what published words amounted to a libel was, more than forty years ago, greatly and unjustly extended. The definition of a libel submitted *arguendo* by the late General Hamilton, and adopted by the court in The People v. Croswell, 3 John. Cas. 354, and subsequently approved by the court in Steele v. Southwick, 9 John. R. 215, is complained of as erroneous. The court in the case last cited said that "a writing published maliciously with a view to expose a person to contempt and ridicule is undoubtedly actionable; and what was said to this effect by the judges of the C. B. in Villers v. Monsley, 2 Wils. 403, is founded in law, justice and sound policy. The opinion of the court in the case of Riggs v. Denniston, 3 John. Cas. 205, was to the same effect; and the definition of a libel as given by Mr. Hamilton in the case of People v. Croswell, 3 John. Cas. 354, is drawn with the utmost precision. It is a censorious or ridiculing writing, picture or sign, made with a mischievous and malicious intent towards government, magistrates or individuals. To allow the press to be the vehicle of malicious ridicule of private character would soon deprave the moral taste of the community, and render the state of society miserable and barbarous." In the case of Cropp v. Tilney, 3 Salk. 226, HOLT, Ch. J., said, "Scandalous matter is not necessary to make a libel. It is enough if the defendant induces an ill opinion to be held of the plaintiff, or to make him contemptible or ridiculous." Any written slander, though merely tending to render the party subject to disgrace, ridicule or contempt, is actionable, though it do not impute any definite crime punishable in the temporal courts. 3 Bl. Comm. (Chitty's ed.) 123, note 5.

But it is argued that the publication in question is not libelous, even admitting the definition of libel adopted by this court in The People v. Croswell and in Steele v. Southwick. It is denied that it

is a censorious or ridiculing writing; and although it is conceded that it reflects upon the plaintiff, it is said that it does not do so in a severe or censorious manner; and that it does not convey any sentiment of ridicule. The admission that the publication reflects upon the plaintiff, though qualified by the remark, that it does not do so severely, yields the material point in controversy. The degree of censure or ridicule does not enter into the definition. "A censorious or ridiculing writing towards an individual" is defined to be a libel, "if made with a mischievous and malicious intent." "Censoriousness" is defined by Webster to be a "disposition to blame and condemn; the habit of censuring or reproaching." He defines the word "reflect," in his fifth subdivision, thus: "to bring reproach; to reflect on; to cast censure or reproach." It would seem to me that if a censorious writing made with a mischievous and malicious intent towards an individual is libelous, a writing made with a like intent reflecting upon an individual, whether more or less severely, would be none the less libelous. But I do not think that the rule requires any such aid. It is enough that we approve of the rule as settled, acted upon and undeviatingly adhered to by this court for about forty years. * * * The *innuendo* in this case, which states the meaning of the publication to be that the plaintiff, in consequence of being known in the county of Otsego, was in bad repute there, and would not for that reason like to bring a suit for a libel in that county, appears to me to express the true meaning of the publication. The question whether the alleged libel was published of and concerning the plaintiff, and whether the true meaning of the words is such as is alleged in the *innuendo* or not, is a question of fact which belongs to the jury and not to the court to determine. Van Vechten v. Hopkins, 5 John R. 221; Goodrich v. Woolcot, 3 Cowen, 231; Peake v. Odlham, Cowp. 275; 2 Bl. R. 961; Dexter v. Taber, 12 John. R. 239. It is well settled that where the slanderous charge may be collected from the words themselves or from the general scope of the publication, it is not necessary to make any averment as to circumstances to the supposed existence of which the words refer. So where the libelous meaning is apparent on the face of the declaration, *innuendos* and averments are unnecessary; but if introduced and not warranted by the subject matter, they may be rejected as surplusage. Croswell v. Weed, 25 Wend. 621. * * * *

Assuming then that the count is good in substance, the next in-

quiry is whether the first special plea to that count interposes a substantial defense and is well pleaded. For the plaintiff it is insisted that the charge of bad reputation can only be justified by facts showing such reputation deserved. Such a charge, it is said, implies in its popular acceptation that the party has done something to bring him into disrepute. The plea, it is alleged, is bad for being as general as the charge, and for the omission to state any facts which, if proved, would make good the charge. The plea sets up as a justification that the plaintiff had the reputation in Otsego County of a proud, captious, censorious, arbitrary, dogmatical, malicious, illiberal, revengeful and litigious man, and that therefore he was in bad repute. No facts or conduct of the plaintiff to show that such reputation was deserved are set forth in the plea. If the charge had been that the plaintiff had the reputation of having committed a particular crime, no one, I presume, would insist that a plea simply setting up the existence of such a reputation would be good. In such a case it would be indispensable to set forth the necessary facts showing the plaintiff to be guilty of the crime of which it was said he had acquired the reputation. By any other rule the reputation of any man, however pure, might be successfully assailed and effectually destroyed by a combination of malicious individuals. The general rule is thus perspicuously stated at length by SPENCER, Ch. J., in Van Ness v. Hamilton, before referred to. "A plea in bar of the plaintiff's action must be certain to a common intent. It must be direct and positive in the facts set forth, and must state them with all necessary certainty. It is not correct to say that in a plea justifying a libel, because the subject comprehends multiplicity of matter, there may be general pleading to avoid prolixity." And again: "The rule to which I allude is laid down in the case of J'Anson v. Stuart, 1 T. R. 748. There the action was for a libel charging the plaintiff with being connected and concerned with a gang of swindlers and common informers. The plea stated that the plaintiff had been dishonestly concerned and connected with and was one of a gang of swindlers and common informers, and had also been guilty of defrauding divers persons with whom he had dealings and transactions. On demurrer to this plea, it was decided that it was bad on account of its generality; that it was contrary to every rule of pleading to charge the plaintiff with swindling without showing any instances of it: for wherever one person charges another with fraud, he must know the

particular instances on which his charge is founded, and therefore ought to disclose them." In this case the charge is not of any act committed by the plaintiff, or the reputation of the commission of any particular act, improper, immoral, criminal or otherwise; but only that in the estimation of the public in the county named, the plaintiff's reputation is bad; in other words, that his good name, credit or honor, as derived from public opinion, was to a greater or less extent forfeited or bad; that such was the public estimation at the time of the publication in question. This charge implies no particular act committed by the plaintiff. The defendants justify by averring the existence of the bad reputation, specifying in this plea the particular odious qualities which the plaintiff was reputed to possess, and averring that on that account he did not like to try his cause in the county. I think the plea is sufficient. I do not see in what other manner a justification could be interposed. In the nature of things, it would be impracticable for the defendants to spread upon paper the particular manifestations of pride, captiousness, malice, etc., which go to form such a character, and to prove that his public reputation was the consequence of such conduct. Reputation is the estimate in which an individual is held by public fame in the place where he is known. And the existence of a good or bad reputation is, I think, a fact which may be directly put to issue.[1]

[1] In Quinn v. Prud. Ins. Co., 116 Ia. 522, 90 N. W. 349 (1902), the court said: "Whatever may be the rule of evidence in this respect in cases where the language complained of is in itself ambiguous or uncertain, or where proof of extrinsic facts casts many doubts upon the real meaning intended to be conveyed, it is a well-established doctrine that, in the absence of such ambiguity and uncertainty, it is not competent for a witness who has simply read the alleged libel to put his construction upon the language employed. To admit such testimony is to allow the witness to usurp the functions of the court and jury. Anderson v. Hart, 68 Iowa, 400, 27 N. W. 289. The case cited was an action for libel alleged to be contained in an affidavit in which defendant stated that a certain paper bearing his name was a forgery. A witness was permitted to swear that he understood from the writing that defendant meant to accuse plaintiff of the crime. This was held error. It is there said: 'It will be observed that the witness was asked to construe the libel, and, in effect, was asked to look at the affidavit, and state whom the defendant meant to charge with the crime. * * * When a libelous communication on its face, directly, or by way of innuendo or otherwise, refers to any person, it is possible a witness may be asked who, or what person was meant. Subject to this rule, the decided weight of authority, we think, that the alleged libel must be construed by the court and jury.' 'Where the

§ 3.—SLANDER.

POLLARD v. LYON.

(Reported, *Supra*, p. 660)

WINSETTE v. HUNT.

(Reported, *Supra*, p. 678*n*.)

WILDEE v. McKEE.

(Reported, *Supra*, p. 688)

TIMES PUB. CO. v. CARLISLE.

(94 Fed. R. 762; 36 C. C. A. 745.—1899.)

SANBORN, Circuit Judge. * * * This declaration of law (that malice is implied from the publication of a charge which is libelous *per se*, and without justification or excuse) has exactly the same practical effect as the more simple and more philosophic rule that malice, in the common acceptation of the term,—that is to say, ill will, evil intent, bad motive,—is not required to be either pleaded or proved to entitle the injured party to recover the actual damages he has sustained from the unprivileged publication of a false and libelous charge. The person libeled is as clearly entitled to full compensation for the loss he has sustained from a wrong inflicted

language is clear and unambiguous, the question whether or not it is actionable is one for the court, as is, also, the question whether or not the words *ex vi termini*, or as explained by the inducement and colloquium, are reasonably susceptible of the meaning which is attributed to them by the innuendo." 18 Am. & Eng. Enc. Law (2d Ed.) 990. Where any doubt exists as to the meaning of a publication, so that extrinsic evidence is needed to determine whether it is actionable, it is then a question for the jury, under proper instructions by the court. Bourreseau v. Journal Co., 63 Mich. 425, 30 N. W. 376, 6 Am. St. Rep. 320; Mosier v. Stoll, 119 Ind. 245, 20 N. E. 752."

with a laudable motive, or through mistake or inadvertence, as from one perpetrated from a bad motive, or with a diabolical intent. Ullrich v Press Co. (Sup.) 50 N. Y. Supp. 790, 798; Hamilton v. Eno, 81 N. Y. 126; King v. Root, 4 Wend. 127. It is a corollary to these rules that it is no justification for the publication of such a libel that another had spoken or written the false charge, and that the libeler simply repeated his statement, and that he gave the name of his informant. It is no defense to an action of trespass that another trespassed, and informed the defendant how to do it without expense or trouble; and it is no excuse or justification for an injury to a fair reputation that another has commenced to besmirch it, and has furnished the pigments to carry on the nefarious undertakings. Sans v. Joerris, 14 Wis. 666; Newman v. Foster, 8 Wend. 602; Odgers, Libel & Sland. p. 124.

But may exemplary or punitive damages be recovered for a libelous publication, without proof of ill will, hatred, or an intent on the part of the libeler to injure his victim? Punitive damages are given as an example to the public, to deter others from committing a like offense, and as a punishment to the wrongdoer. They are never allowable where the defendant, after due investigation, in good faith, with reasonable cause to believe the charge to be true, has published it from a proper motive, in the honest belief that it is true. Are there, however, no circumstances under which the jury may award exemplary damages, in the absence of proof of actual evil intent or bad motive on the part of the defendant? May the libeler shut his eyes, and blindly publish heinous charges against men and women of spotless character and unsullied reputation, and still escape liability for everything except the actual damages which they can prove, because he had no intention to injure them, no care about them, but simply sought to make money from the sale of the racy story? If he may not, where is the dividing line, and who shall determine in each case, the court or the jury, whether or not exemplary damages shall be allowed? It is not every degree of negligence, it is not a mere mistake or inadvertence occurring in the course of a reasonable investigation, that will lay the foundation for exemplary damages for the publication of a libel; and yet every man is bound to use his own property and pursue his own avocation in such a way that he may not unlawfully injure the property or violate the rights of his neighbors. Not only this, but when his property or his avocation borders upon or impinges upon the prop-

erty or rights of his fellow men, he is bound to exercise ordinary care to ascertain the extent of that property and of those rights, and to abstain from unnecessarily injuring them. * * * Moreover, every reason for the allowance of exemplary damages applies with as much cogency and force to a libel published with a reckless disregard of the rights of the libeled as to one published with an evil intent or a bad motive. Such damages are allowed as an example to the public, and as a punishment to the wrongdoer. The main purpose of their allowance is to protect the characters and reputations of those who have not been attacked, and to warn all men not to destroy or injure the names that are still good and the reputations that are yet fair. The interests of these citizens and of the public demand the protection of their reputations against assaults that would destroy them with a reckless disregard of the rights of their owners as forcibly as they do that they shall be protected against those inspired by hatred or ill will. The effect of libels published with recklessness is as deleterious as that of libels published with ill will. In truth, the demand for the protection against libelous publications made with stolid indifference to, and reckless disregard of, the rights of those injured, is far more urgent than the demand for protection against those published with hatred, because the former are usually inspired by avarice, and are as much more numerous and as much more dangerous to individuals and the public as avarice is more prevalent than spite.

Turn it as you will, the reason of the rule and the great weight of authority upon the subject lead alike to this conclusion: Exemplary damages may be allowed by the jury, in actions of libel, when, upon a consideration of all the facts and circumstances of the case, they find that the publication has been made with a reckless disregard of the rights and feelings of the person libeled, as well as where they find that it has been inspired by hatred or ill will towards, or an intent to injure, him. Bennett v. Salisbury, 45 U. S. App. 636, 639, 24 C. C. A. 329, 331, and 78 Fed. 769, 771; Ullrich v. Press Co. (Sup.) 50 N. Y. Supp. 788, 792; Samuels v. Association, 75 N. Y. 604; Bergmann v. Jones, 94 N. Y. 51, 62; Holmes v. Jones, 121 N. Y. 461, 467, 24 N. E. 701; Warner v. Publishing Co., 132 N. Y. 181, 184, 31 N. E. 393; Holmes v. Jones, 147 N. Y. 59, 61, 41 N. E. 409; Smith v. Mathews, 152 N. Y. 152, 158, 46 N. E. 164; Young v. Fox (Sup.) 49 N. Y. Supp. 634; Shanks v. Stumpf (Sup.) 51 N. Y.

Supp. 154; Callahan v. Ingram, 122 Mo. 355, 371, 372, 26 S. W. 1020; Buckley v. Knapp, 48 Mo. 161; Clements v. Maloney, 55 Mo. 352, 359.[1]

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§ 4.—DEFENSES IN ACTIONS FOR DEFAMATION.

McCLOSKEY v. PULITZER PUB. CO.

(152 Mo. 339; 53 S. W. 1087.—1899.)

BURGESS, J. This is an action for libel, which resulted in a verdict and judgment for defendant, from which plaintiff appeals. * * *

Plaintiff asked the court to instruct the jury as follows: "(1) The court instructs the jury that, although you may believe from the evidence that a part or the whole of the article set out in plaintiff's petition was read to defendant by the wife of plaintiff, and although you may believe from the evidence that the defendant published the same believing in good faith that the same was true, yet [if you believe the article itself was false and libelous] the court instructs you that the defendant's good faith or belief in the truth of said article does not constitute a defense in this case, but the jury should consider the same in mitigation of damages. * * * *

It is claimed that the court committed error in amending plaintiff's first instruction by inserting the words, "if you believe the article itself to be false and libelous," and instructing the jury that they were the sole judges as to whether the article complained of is libelous or not; the grounds of the contention being: First, that the publication was libelous *per se*; second, because section 14, art. 2, of the state constitution does not apply to civil cases with the same force as criminal cases; third, that said section, and also section 3872, Rev. St. 1889, direct that the jury shall in these cases determine the law "under the direction of the court." Conceding that the publication was libelous *per se*,—that is, "when by itself considered,"—its truth was a defense to the action, and of which the jury would not have been advised but for the insertion of the words of which the plaintiff complains. Without the insertion of those words, the jury were authorized to find for plaintiff, although they may have believed from the evidence that the article was true.

[1] The same doctrine is applied in Crane v. Bennett, 177 N. Y. 106 (1904), distinguishing and limiting Krug v. Pitass, 162 N. Y. 154, 56 N. E. 526 (1900).

Under our state constitution and statute, in an action for libel the truth thereof may be given in evidence (section 14, art. 2, Const. Mo.; section 2081, Rev. St. 1889; Edwards v. George Knapp & Co., 97 Mo. 432, 10 S. W. 54), and, when proven, is a perfect defense to the action. In Buckley v. Knapp, 48 Mo. 152, in the first instruction given for plaintiff the jury were told that, if they believed and found from the evidence that the matter stated in plaintiff's petition as having been published by defendant of and concerning the plaintiff was and is untrue and defamatory of her, they should find the issue for plaintiff; and by the fifth instruction given in behalf of defendant they were told that an action for defamation could not be sustained by a person of whom the truth was published, though the publication were made from actual malice, and therefore, if it were shown by the evidence that the article published was true so far as related to the plaintiff, a verdict should be returned for the defendant; and in speaking of these two instructions the court observed: "Defendant's fifth instruction so completely qualifies the first one given at the instance of the plaintiff that it is utterly impossible to allege anything objectionable against it." Unless, therefore, the jury believed that the article complained of was of itself false and libelous, the plaintiff was not entitled to recover, and no error was committed in so instructing them.[1]

[1] In Neilson v. Jensen, 56 Neb. 430, 76 N. W. 866 (1898), it is said: "In a civil case at common law the truth of a charge published was a defense to one who was sued for libel; but our constitution has changed this rule, and a publisher may not exempt himself from liability for libeling another simply by showing that the charge published was true, but must go further, and show that the publication was made under such circumstances as would justify the conclusion that he acted with 'good motives and for justifiable ends.'"

In Rutherford v. Paddock, 180 Mass. 280, 62 N. E. 381 (1902); proof of plaintiff's unchastity was held insufficient to establish truth of charge that she was a "dirty, old whore."

In Dement v. Houston Printing Co., 14 Tex. Civil App. 391, 37 S. W. 785 (1896), it was held that a defendant, who had published that third parties charged plaintiff with being a horse thief, could justify only by showing that plaintiff was a horse thief.

KIMBER v. PRESS ASSOCIATION.

(1893—1. Q. B. 65.)

Lord ESHER, M. R. I am of opinion that this appeal must be dismissed. The question is whether that which was done by the defendants was privileged by the law of England. The rule is that where there are judicial proceedings before a properly constituted judicial tribunal, which judicial tribunal is exercising its jurisdiction in open court, then a fair and accurate account published by any one of what then took place is privileged. Under certain circumstances such publication may be hard upon a person who is named in the report, but considerations of public policy require that such hardship should be endured rather than that judicial proceedings should be conducted in secret. If judicial proceedings were conducted in secret it might be productive of greater mischief than if the character of an individual should be for a time injured by an unfounded charge. The proposition of law is this, that if there is a judicial proceeding before a judicial tribunal, and in open court, a fair and accurate account of what then took place is privileged, if it is published without malice. That being so, we have to consider whether the present case is brought within that rule. This was a case in which a summons was asked for before magistrates against the plaintiff upon a charge of perjury. Now magistrates have jurisdiction to hear such an application; they are a legally constituted body, having jurisdiction to determine whether such a summons shall issue or not. The issue of such a summons is a judicial proceeding, and the consideration thereof is a judicial proceeding, and these are judicial proceedings taken before a judicial tribunal properly constituted for the purpose. This case is therefor so far within the rule. It is said however that although the magistrates were a judicially constituted body, and were exercising judicial functions, yet they were not doing so in open court. (After quoting from the statute and construing it.) Justices are by that section a legally constituted authority to exercise a judicial discretion in a judicial proceeding, and that must be done in open court unless there is an enactment to the contrary. This proceeding was therefore taken in open court.

It was further argued that a report of the proceedings must not

be published unless the magistrates have given a final determination. If there are judicial proceedings which, in the result, lead to final determination, although that stage is not arrived at, yet a fair and accurate account of the proceedings may be published before the final determination. That was really the decision of Lord CAMPBELL in Lewis v. Levy, E. B. & E. 537; and I think that in Usill v. Hales, 3 C. P. Div. 319, the early part of the judgment of Lord COLERIDGE, C. J., seems to show that he would have held, if he had not considered himself overborne by authority, that the refusal of a summons upon an *ex parte* application was not a final determination in open court, a report of which would be privileged; he however thought that such a proposition was overruled by authority. It was because of that expression of opinion by Lord COLERIDGE that LOPES, J., I think, treated the subject rather tenderly, but came to the conclusion that a report might be published of preliminary proceedings if in the end they must result in a final determination. I think that the law must be so. The law then is that where there are proceedings, which in the end result in a final determination, any one may publish a fair and accurate account of the preliminary proceedings. Then must an application for a summons, such as was made in this case, end in a final determination? If it is refused, that is a final determination. If the summons is issued, then the matter must proceed to a further inquiry, and then perhaps to trial, and at some stage of the proceedings there must be a final determination of some kind or other. That brings this case entirely within the rule, and a fair and accurate report of the proceedings upon an application for the issue of a summons, which is granted, may be published. Upon the next point, as to the *onus* of proof, for myself I am of the opinion, that to claim privilege and to justify the publication during the course of a trial, the defendant must show that the report is a fair and accurate one, published without malice; that is to say, the burden of proof is on the defendant. A person on whom the burden of proof lies may however vouch the evidence adduced by the plaintiff, to supply that proof, and not adduce any evidence himself. The question in this case then is whether the plaintiff himself did not do that which enables the defendant to say that what it was necessary for him to prove was proved in this case by the plaintiff, viz., that the report published in this case was a fair and accurate report. The plaintiff called a witness, who proved what took place. Everything which is stated in the alleged libel

did in fact take place, but it is said that there were omissions which made the report an unfair and inaccurate report. Two omissions were specified. There was nothing during the proceedings to show that the applicant was a peculiar person, and the judge at the trial was of opinion that the omission of the applicant's name was, under those circumstances, clearly immaterial, and that there was no question for the jury upon that. The other omission was that the report did not state the name of the person in whose bankruptcy the perjury was alleged to have been committed, and it was suggested that some persons might think that the plaintiff himself was the bankrupt. The judge thought that also quite immaterial, and I agree with him. The appellant's counsel has admitted that only an idiot could suppose anything of the kind. In this case therefore the plaintiff has saved the defendant from the necessity of proving that this was a fair and accurate report, for it was proved by the plaintiff's own witness that it was so. The judge at the trial was justified in holding that it was proved beyond the possibility of doubt that the report was fair and accurate, and that there was consequently no question for the jury.

This appeal fails, and must be dismissed.

CROCKETT v. MCLANAHAN.

(110 Tenn. 517 ; 72 S. W. 950.—1903.)

MCALISTER, J. The question presented for our determination upon this record is whether a party to a judicial proceeding is liable in damages to a stranger to the record for defamatory matter, alleged in the pleading concerning him, or whether said matter, being pertinent and relative to the issue, is not absolutely privileged. * * * In Lead v. White, 4 Sneed, 113, it was said, viz.: "The communications are, on account of the occasion on which they are made, *prima facie,* or, as the books have it, 'conditionally,' privileged—that is, they do not amount to defamation (actionable) until it appears that the communication had its origin in actual malice in fact. In such cases it will be incumbent on the plaintiff to show, in addition to the injurious publication, malice in fact and that the occasion was seized upon as a mere pretext. Illustrations of this class of communications are statements in respect of the character of serv-

ants, official communications, reports of judicial proceedings, etc. But," continues the court, "there is another class of cases which are absolutely privileged and depend in no respect for their protection upon their *bona fides*. The occasion is an absolute privilege; and the only questions are whether the occasion existed, and whether the matter complained of was pertinent to the occasion. In this class are embraced judicial proceedings. The proceedings connected with the judicature of the country are so important to the public good, the law holds that nothing which may therein be said with probable cause, whether with or without malice, can be slander, and in like manner that nothing written with probable cause under the sanction of such an occasion can be a libel. The pertinency of the matter to the occasion is that which is meant by probable cause, and probable cause is, in this class of absolutely privileged communications, what *bona fides* is to the class of conditionally privileged communications, which are protected unless there is malice in fact."

It will be observed that the cardinal inquiry is whether the alleged defamatory matter is pertinent to the issue involved. As said by this court in Shadden v. McElwee, 86 Tenn. 152, 5 S. W. 604, 6 Am. St. Rep. 821, "where the matter alleged is pertinent to the issue, or fairly supposed to be so, although not in the strictest sense relevant, the pleader is absolutely privileged, although he may have entertained sentiments of malice to the adverse party." It is, moreover, the rule that the question of pertinency or relevancy is a question of law for the court. Lea v. White, 4 Sneed, 111; Shadden v. McElwee, 86 Tenn. 152, 5 S. W. 602, 6 Am. St. Rep. 821; Jones v. Brownlee (Mo.) 61 S. W. 795, 53 L. R. A. 448. It cannot be seriously controverted that the allegations of the bill in the United States Circuit Court with respect to the disqualifications of the plaintiff as an elector in the election of August 8, 1901, were pertinent and relevant to the matter of inquiry in that suit. The legality of the election was challenged in that proceeding upon the ground that the municipal aid subscription had not been carried by a three-fourths majority of the voters, as required by law. It was necessary that the bill should specifically recite the names of the disqualified voters, in order that an issue might be made in respect of their qualifications. Moore v. Sharp, 98 Tenn. 493, 41 S. W. 587; Blackburn v. Vick, 2 Heisk, 383. The name of the plaintiff was included in a list of about 50 citizens of the Twentieth Ward, who were alleged to have been disqualified to vote in said election on

account of a failure to re-register after changing their residence in said ward 20 days before the election. The matter alleged being pertinent to the issue, it was absolutely privileged, and it is wholly immaterial whether the element of malice entered into the charge. As said in Lea v. White, *supra*: "It certainly cannot be maintained that because a person is malicious in his statements toward the adverse party, he will not be permitted to set up in his defense any matter that he may reasonably suppose would be available." * * * In the case of Jones v. Brownlee, 61 S. W. 795, 53 L. R. A. 448, a case from Missouri, the court said, viz.: "With the exception of Ruohs v. Backer, 6 Heisk, 395, 19 Am. Rep. 598, we have not been able to find any case, either in England or the United States, which holds that an absolutely privileged communication made in a pleading in a cause ceases to be such when written or spoken as to one not a party to the suit. We think such a distinction cannot be made without disregarding the public policy upon which the whole rule depends. There are so many cases in which the rights and character of persons who are not parties to the suit become collaterally the subject of inquiry, and the right to make such inquiry so unquestionable, that no good reason for making the exception can be given so long as the rule itself is maintained." [1]

1. This case substantially overrules Ruohs v. Backer, 6 Heisk. 395, 19 Am. R. 598.

In Union Mut. Life Ins. Co. v. Thomas, 83 Fed. 803, 28 C. C. A. 96 (1897), the court said: "Contrary to the rule of the English courts, the American courts have established the doctrine that matter inserted in a pleading in court is privileged only when connected with the subject-matter of the litigation. It is perhaps not necessary that it be in all cases material to the issues presented by the pleadings, but it must be legitimately related thereto, or so pertinent to the subject of the controversy that it may, in the course of the trial, become the subject of inquiry. White v. Nichols, 3 How. 266; Hoar v. Wood, 3 Metc. (Mass.) 193; McLaughlin v. Cowley, 127 Mass. 316; Gilbert v. People, 1 Denio, 41; Sherwood v. Powell, 61 Minn. 479, 63 N. W. 1103; Maulsby v. Reifsnider, 69 Md. 143, 14 Atl. 505; Moore v. Bank, 123 N. Y. 420, 25 N. E. 1048. Tested by this rule, the matter alleged by the insurance company in its answer to the suit of Johanna Martin was not privileged."

In Sickles v. Kling, 31 Misc. (N. Y.), 287 (1900), GAYNOR, J. said: "In England the decisions, including the case against the great advocate Scarlett, afterwards Lord Abinger (Hodgson v. Scarlett, 1 B. & Ald. 232), for a long time left it uncertain whether the privilege of counsel in respect of their statements in the conduct and trial of causes was absolute or qualified. The question was put at rest in 1883 by the Court of Appeal in Munster v. Lamb (11 Q. B. D. 588), where it was decided to be absolute. But in this state the privilege is only a

BYAM v. COLLINS ET AL.

(111 N. Y. 143.—1888.)

EARL, J. The general rule is that in the case of a libelous publication the law implies malice and infers some damage. What are called privileged communications are exceptions to this rule. Such communications are divided into several classes, with one only of which we are concerned in this case, and that is generally formulated thus: "A communication made *bona fide* upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, although it contained criminating matter which, without this privilege, would be slanderous and actionable; and this, though the duty be not a legal one, but only a moral or social duty of imperfect obligation." The rule was thus stated in Harrison v. Bush, 5 Ellis & Black. (Q. B.) 344, and has been generally approved by judges and text-writers since. In Toogood v. Spyring, 1 Cr. M. & R. (Ex.) 181, an earlier case, it was said that the law considered a libelous "publication as malicious unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned;" and that statement of the rule was approved by FOLGER, J., in Klench v. Colby, 46 N. Y. 427, and Hamilton v. Eno, 81 N. Y. 116. In White v. Nicholls, 3 How. (U. S. 266, 291, it was said that the description of cases recognized as privileged communications must be understood as exceptions to the general rule, and "as being founded upon some apparently recognized obligation or motive, legal, moral or social, which may fairly be presumed to have led to

qualified one, i. e. it extends only to statements which are material and pertinent to the case, Marsh v. Ellsworth, 50 N. Y. 309; Youmans v. Smith, 153 N. Y. 214. If counsel keep within the facts of the case they are protected by the privilege of the occasion no matter what they say, or however forced their inferences, deductions, suggestions, surmises, criticisms or characterizations from the facts may be. I speak thus broadly subject to correction, there being no case which goes so far in point in this state; but it seems to me that it must be so. Where else can the line be drawn? A counsel's position is one of great difficulty, and he has special need to have his mind clear of all anxiety. A wide latitude is justly and necessarily given to him in order to insure a full hearing and the doing of justice."

the publication, and, therefore, *prima facie,* relieves it from that just implication from which the general law is deduced."

Whether, within the rule as defined in these cases, a libelous communication is privileged is a question of law; and when upon any trial it has been held as matter of law to be privileged, then the burden rests upon the plaintiff to establish as matter of fact that it was maliciously made, and this matter of fact is for the determination of the jury.

It has been found difficult to frame this rule in any language that will furnish a plain guide in all cases. It is easy enough to apply the rule in cases where both parties, the one making and the other receiving the communication, are interested in it, or where the parties are related, or where it is made upon request to a party who has an interest in receiving it, or where the party making it has an interest to subserve, or where the party making it is under legal duty to make it. But when the privilege rests simply on the moral duty to make the communication, there has been much uncertainty and difficulty in applying the rule. The difficulty is to determine what is meant by the term "moral duty," and whether in any given case there is such a duty. In Whiteley v. Adams, 15 C. B. N. S. 392, ERLE, Ch. J., said: "Judges who have had, from time to time, to deal with questions as to whether the occasion justified the speaking or the writing of defamatory matter, have all felt great difficulty in defining what kind of social or moral duty, or what amount of interest will afford a justification;" and in the same case, BYLES, J., said the application of the rule "to particular cases has always been attended with the greatest difficulty; the combinations of circumstances are so infinitely various."

The rule as to privileged communications should not be so extended as to open wide the flood-gates of injurious gossip and defamation by which private character may be overwhelmed and irreparable mischief done, and yet it should be so administered as to give reasonable protection to those who make and receive communications in which they are interested, or in reference to which they have a real, not imaginary, duty. Every one owes a moral duty, not, as a volunteer in a matter in which he has no legal duty or personal interest, to defame another unless he can find a justification in some pressing emergency. In Coxhead v. Richards, 2 Mann. G. & S. 569, 602, COLTMAN, J., said: "The duty of not slandering your neighbor on insufficient grounds is so clear that a violation of that duty

ought not to be sanctioned in the case of voluntary communications except under circumstances of great urgency and gravity. It may be said that it is very hard on a defendant to be subject to heavy damages when he has acted honestly and when nothing more can be imputed to him than an error in judgment. It may be hard, but it is very hard on the other hand to be falsely accused. It is to be borne in mind that people are but too apt rashly to think ill of others; the propensity to tale-bearing and slander is so strong amongst mankind, and when suspicions are aroused, men are so apt to entertain them without due examination, in cases where their interests are concerned, that it is necessary to hold the rule strictly as to any officious intermeddling by which the character of others is affected;" and in the same case CRESSWELL, J., said: "If the property of the shipowner on the one hand was at stake, the character of the captain was at stake on the other; and I cannot but think that the moral duty not to publish of the latter defamatory matter which he did not know to be true, was quite as strong as the duty to convey to the shipowner that which he believed to be true."

One may not go about in the community and, acting upon mere rumors, proclaim to everybody the supposed frailities or bad character of his neighbor, however firmly he may believe such rumors, and be convinced that he owes a social duty to give them currency that the victim of them may be avoided; and, ordinarily, one cannot with safety, however free he may be from actual malice as a volunteer, pour the poison of such rumors into the ears of one who might be affected if the rumors were true. I cite a few cases by way of illustration. In Godson v. Home, 1 B. & B. 7, one Noah solicited the plaintiff to be his attorney in an action. The defendant, apparently a total stranger, wrote to Noah to deprecate his so employing the plaintiff, and this was held to be clearly not a confidential or privileged communication. In Storey v. Challands, 8 C. & P. 234, one Hersford was about to deal with the plaintiff when he met the defendant, who said at once, without his opinion being asked at all, "If you have anything to do with Storey you will live to repent it; he is a most unprincipled man," etc., and Lord DENMAN directed a verdict for the plaintiff because the defendant began by making the statement without waiting to be asked. In York v. Johnson, 116 Mass. 482, the defendant, a member of a church, was appointed with the plaintiff and other members of the church on a committee to

prepare a Christmas festival for the Sunday-school. He declined to serve, and being asked his reason by Mrs. Newton, a member of the committee, said that a third member of the committee, a married man, had the venereal disease, and being asked where he got it said he did not know, but that "he had been with the plaintiff," who was a woman, and it was held that this was not a privileged communication. There was no question of the defendant's good faith and reasonable grounds of belief in making the communication, and yet DEVENS, J., in the opinion said: "The ruling requested by the defendant that the communication made by him to Mrs. Newton was a privileged one and not actionable except with proof of express malice, was properly refused. There was no duty which he owed to Mrs. Newton that authorized him to inform her of the defamatory charges against the plaintiff, and no interest of his own which required protection justified it. He had declined to serve upon the same committee with Mrs. York; but he was under no obligation to give any reason therefor, however persistently called upon to do so; even if Mrs. Newton had an interest in knowing the character of Mrs. York, as a member of the same church, it was an interest of the same description which every member of a community has in knowing the character of other members of the same community with whom they are necessarily brought in contact, and would not shield a person who uttered words otherwise slanderous."

Having thus stated the general principles of law applicable to a case like this, I will now bring to mind the facts of this case so far as they pertain to the defamatory letter. The plaintiff was a lawyer and had been engaged in the practice of his profession at Caledonia for several months and resided there at the date of the letter. Miss Dora McNaughton and the defendant also resided there. The plaintiff was on terms of social intimacy with Dora, and was paying her attention with a view to matrimony, and some time subsequently married her. Mrs. Collins was about twenty-five years old, two years and a half younger than Dora, and was married November 2, 1875; and prior to that she had always resided within a mile and a half from the residence of Dora, and they had been very intimate friends. Dora had a father and no brother, and Mrs. Collins had a brother. During the time of this intimacy, and at some time before the marriage of Mrs. Collins, Dora repeatedly requested of her that if she "knew anything about any young man she went

with, or in fact any young man in the place, to tell her because her father did not go out a great deal and had no means of knowing, and people would not be apt to tell him;" that she, Mrs. Collins, had a brother and would be more apt to hear what was said about young men, and Dora wished her to tell what she knew. Their intimacy continued after the marriage of Mrs. Collins until January before the letter was written, when a coldness sprang up between them. They became somewhat estranged and their intimacy ceased. Mrs. Collins testified that when she wrote the letter she thought just as much of Dora as if she had belonged to her family; that she had heard the defamatory rumors and believed them, and, therefore, did not wish her to marry the plaintiff. It must be observed that the request of Dora to Mrs. Collins for information about young men was not made when she was contemplating marriage to any young man, and that the request was not for information about any particular young man, or about any young man in whom she had any interest; but it was for information about the young men generally with whom she associated. Nor literally construing the language, did Dora wish for information as to the gossip and rumors afloat about young men. What she asked for was such facts as Mrs. Collins knew, and not for her opinion about young men or her estimation of them. But if we assume that the request was for information as to all the rumors about young men which came to the knowledge of Mrs. Collins, the case of the defendant is not improved. At that time the plaintiff was not within Dora's contemplation, as she did not know him until long after. The request was not for information as to any young man who might pay her attention with a view to matrimony; it was for information about all the young men in her circle. Mrs. Collins was not related to her and was under no duty to give information, and Dora had no sufficient interest to receive the information. Mrs. Collins was under no greater duty to give the information to Dora than to any of the other young ladies of her acquaintance in the same circle. She could properly tell what she knew about young men, but could not defame them, even upon request, by telling what she did not know, what nobody knew, but what she believed upon mere rumors and hearsay to be true. The mere fact that she was requested or even urged to give the information, did not make the defamatory communication privileged. York v. Johnson, *supra*.

But there is no proof that this letter was written to Dora in pur-

suance of any request made by her four years before its date, and there was no evidence which authorized the jury to find so if they did so find. On the contrary, it is clear that Dora would not, at the time, have gone to Mrs. Collins for any information as to the plaintiff if she had desired any, and that she did not wish for the information from her; and that this was known to Mrs. Collins the language of the letter clearly shows. In the defendant's answer it is alleged that Mrs. Collins' letter was prompted by her friendship for Dora and by the solicitation of "mutual friends to interfere in the matter and break off the relations which seemed to exist between the plaintiff and Dora," and there is no averment that it was written in pursuance of any request coming from Dora. The letter itself, as well as the evidence of Mrs. Collins, shows unmistakably that it was thus prompted. Mrs. Collins did not testify that she wrote the letter in pursuance of any request of Dora, and the action was not tried upon that theory, and no question as to the request was submitted to the jury. The trial judge charged the jury broadly that if the relations of Dora and Mrs. Collins were of such an intimate character as to warrant the latter in informing the former "against a person whom she had reason to believe was not a fit person, and if Mrs. Collins acted fairly, in good faith, conscientiously, although mistakenly, there can be no recovery against her," upon the count in the complaint for libel; and then the court said: "Did Mrs. Collins in writing that letter act fairly, act judiciously, not in the matter of good taste, but did she with the facts which had been brought to her mind act in a conscientious and proper manner? If she did, if she acted as an ordinary prudent person would act under the same circumstances, if she had probable ground for her belief, she was justified in writing the letter." Mrs. Collins appears then as a mere volunteer, writing the letter to break up relations which she feared might lead to the marriage of the plaintiff to Dora. If she had been the mother of Dora, or other near relative, or if she had been asked by Dora for information as to the plaintiff's character and standing, she could with propriety have given any information she possessed affecting his character, providing she acted in good faith and without malice. But a mere volunteer having no duty to perform, no interest to subserve, interferes with the relations between two such people at her peril. The rules of law should not be so administered as to encourage such intermeddling, which may not only blast reputation but possibly wreck lives.

In such a case the duty not to defame is more pressing than the duty to communicate mere defamatory rumors not known to be true.

Some loose expressions may doubtless be found in text-books and judicial opinions supporting the contention of the defendant that this letter was, in some sense, a privileged communication. But, after a very careful research, I believe there is absolutely no reported decision to that effect. The case which is as favorable to the defendant as any, if not more favorable than that of any other, is that of Todd v. Hawkins, 8 Car. & P. 88. In that case, a widow, being about to marry the plaintiff, the defendant, who had married her daughter, wrote her a letter containing imputations on the plaintiff's character, and advising a diligent and extensive inquiry into his character, and it was held that the letter was written on a justifiable occasion, and that the defendant was justified in writing it, provided the jury was satisfied that, in writing it, he acted *bona fide*, although the imputations contained in the letter were false or based upon the most erroneous information; and if he used expressions, however harsh, hasty or untrue, yet *bona fide*, and believing them to be true, he was justified in so doing. The letter was held privileged solely upon the ground of the near relationship existing between the widow and the defendant, her son-in-law, which justified his voluntary interference. But the judge expressly stated that if the widow and defendant had been strangers to each other, there would have been a mere question of damage. A case nearer in point is that of The "Count Joannes" v. Bennett, 5 Allen, 169. There it was held that a letter to a woman containing libelous matter concerning her suitor, cannot be justified on the ground that the writer was her friend and former pastor, and that the letter was written at the request of her parents, who assented to all its contents. The decision was put upon the ground that, in writing the letter, the defendant had no interest of his own to serve or protect; that he was not in the exercise of any legal or moral duty; that the proposed marriage did not even involve any sacrifice of his feelings or injury to his affections, and did not, in any way, interfere with or disturb his personal or social relations; that the person to whom the letter was addressed was not connected with him by the ties of consanguinity or kindred, and that he had no peculiar interest in her. Some years before the same learned court decided the case of Krebes v. Oliver, 12 Gray, 239, wherein it was held that state-

ments that a man had been imprisoned for larceny, made to the family of a woman he is about to marry, by one who is no relation of either, and not in answer to an inquiry, are not privileged communications. In the opinion it is said: "A mere friendly acquaintance or regard does not impose a duty of communicating charges of a defamatory character concerning a third person, although they may be told to one who has a strong interest in knowing them. The duty of refraining from the utterance of slanderous words, without knowing or ascertaining their truth, far outweighs any claim of mere friendship."

I am, therefore, of the opinion that the letter was in no sense upon the facts as they appear in the record, a privileged communication.

There was, also, error in the court below as to the verbal slanders alleged in the second cause of action; and what I have already said applies, in part, to these slanders. There was no substantial denial of these slanders in the answer, and there is no dispute in the evidence that they were uttered, and there can be no claim upon the evidence that they were justified. The trial judge charged the jury that the words were slanderous. But he said to them that "there is not that presumption of malice in the case of oral slanders that there is in the case of deliberate writing." This was excepted to by plaintiff's counsel, and was clearly erroneous. In the case of oral defamation, as in the case of written, if the words uttered were not privileged, the law implies malice.

The judge further charged the jury, in substance, that the words, if uttered under the circumstances testified to by Mrs. Collins, were privileged. She testified, in substance, that she uttered the words to Mr. Cameron in confidence after the most urgent solicitation on his part that she should tell him what she knew about the plaintiff. But defamatory words do not become privileged merely because uttered in the strictest confidence by one friend to another, nor because uttered upon the most urgent solicitation. She was under no duty to utter them to him, and she had no interest to subserve by uttering them. He had no interest or duty to hear the defamatory words, and had no right to demand that he might hear them; and under such circumstances there is no authority holding that any privilege attaches to such communications. There was no evidence that would authorize a jury to find that Cameron sought the interview with Mrs. Collins, as an emissary from or an agent of the plaintiff, or that at the plaintiff's solicitation or instigation he ob-

tained the slanderous communications from her, and he did not profess or assume to act for him on that occasion. He was the mutual friend of the parties, and seems to have sought the interview with her either to gratify his curiosity or to prevent the impending litigation between the parties. But even if he obtained the interview with her at the solicitation of the plaintiff, and as his friend, she could not claim that her slanderous words uttered at such interview were privileged.

The trial judge, therefore, erred in refusing to charge the jury that there was no question for them as to the second cause of action but one of damages.

Therefore, without noticing other exceptions to rulings upon the trial, for the fundamental errors herein pointed out, the judgment should be reversed and a new trial granted.[1]

STUART v. BELL.

(1891.—2 Q. B. 341.)

LINDLEY, L. J. This is an action for slander. At the time when the slander was uttered the plaintiff was a valet in the employ of Mr. Stanley. Mr. Stanley was the guest of the defendant, who was the mayor of Newcastle. The plaintiff was staying with his master at the Mansion House at Newcastle. They had come from Edinburgh and were going on further visits. Whilst Stanley and the plaintiff were still at the Mansion House, at Newcastle, the chief constable of that town received from the chief constable of Edinburgh a letter to the effect that a lady who had been staying at the same hotel as the plaintiff had lost a gold watch, and that suspicion had fallen on the plaintiff as the person who stole it. The chief constable of Newcastle sent this letter to the defendant, who read it and returned it, and then told Stanley privately what I have above stated. This communication, which is the slander complained of, was made to Stanley just before he and the plaintiff left Newcastle; they were in fact just about to leave. Two or three days afterwards, Stanley told the plaintiff what had been communicated

[1] The able dissenting opinion of Danforth, J., will repay perusal.

to him, and discharged the plaintiff on the ground that he could not keep in his employ a person on whom any suspicion of dishonesty had fallen. This discharge and the inability of the plaintiff to obtain a fresh situation, have occasioned loss to the plaintiff, and this loss is the special damage which he has sustained by reason of the slander complained of. The learned judge who tried the case told the jury that the communication made by the defendant to Stanley was not privileged, and the jury found a verdict for the plaintiff, damages £250. (After defining "privileged occasions," and quoting from authorities, the Lord Justice proceeds:) The question of privileged occasion turning then on the question of moral and social duty, and being a question of law for the judge and not a question for the jury, it is necessary to consider the grounds on which such duty can be maintained. The grounds in this case are the relation in which the defendant stood to Stanley and the relation in which the defendant stood to the public. This relation to Stanley was that of host to guest, and to some extent, of friend to friend. His relation to the public was that of mayor and magistrate in Newcastle, where Stanley was when the communication was made. The defendant knew that Stanley was about to be entertained by other people at other places, and that the plaintiff would accompany him. Under these circumstances, I am clearly of opinion that it was the defendant's moral and social though not legal duty to communicate to Stanley the information which the defendant had received. That information was no vague rumor or idle gossip, but came officially from the chief constable of Edinburgh to the chief constable of Newcastle, and was sent by him to the defendant, who was, as I have said, mayor of Newcastle and the host of Stanley. Suppose the suspicion which had fallen on the defendant had been well founded and not ill founded, and that the defendant had withheld the information from Stanley, could the defendant have morally justified reticence? I answer no: he would not have been acting up to his duty either to the public or to Stanley. * * * The question of moral or social duty being for the judge, each judge must decide it as best he can for himself. I take moral or social duty to mean a duty recognized by English people of ordinary intelligence and moral principle, but at the same time not a duty enforceable by legal proceedings, whether civil or criminal. My own conviction is that all or, at all events, the great mass of right-minded men in the position of the defendant would have considered it their duty, under

the circumstances, to inform Stanley of the suspicion which had fallen on the plaintiff. My own opinion is clear and strong that it was his moral and social, although not legal, duty to do so; in other words, the occasion was privileged, and the judge should have directed the jury to that effect. It follows that there ought to be a new trial unless there was no evidence of malice on which a jury could properly find a verdict for the defendant.[1]

POST PUBLISHING CO. v. HALLAM.

(59 Fed. Rep. 530.—1893.)

Action by Hallam for libel. The article complained of contained the following language:

"The Berry-Hallam congressional fight in the sixth Kentucky district is still on,—that is to say, Banquo's ghost bobs up now and then, to the annoyance of the congressional nominee, Berry, and the mortification of the defeated candidate, Theo. F. Hallam. The Boone County Recorder delivers a broadside at the Kenton county delegates, and naïvely asks: 'Why don't they come out and tell the truth about what induced them to go to Berry? The world knows.' Yes, the world knows, and you may say Mars and the planets know it also. Proprietor Roth, of the St. Nicholas Hotel, has an inside cinch on this inside information. Everyone knows Colonel Berry. He is a monopolist, corporation controller, millionaire speculator, political wire-puller, first-class hustler, and a pretty good sort of

[1] The question of malice is then considered, and the conclusion reached that there was no evidence of malice. The judgment below was set aside and judgment ordered for the defendant. LOPES, L. J., dissented, holding that the occasion was not privileged. His opinion is based largely upon the language of the letter from the chief constable of Edinburgh, who wrote that the groundwork of suspicion was very slender, and unless trace of the property to Stuart's possession was obtained no action could be taken against him, and asked that very careful and cautious inquiry be made so as not to injure Stuart, unless evidence of his guilt were obtained. "Without obtaining any evidence, without making any inquiry, in hot haste he makes a communication to the master impugning the honesty of his servant. I cannot think the defendant in so acting was discharging any duty social or moral. I think it was an officious and uncalled for act on his part, and therefore the occasion was not privileged." Pp. 355–6.

a fellow. Hallam is a successful lawyer at Covington; but legal eminence does not mean the fat incomes that are its synonyms on this side of the Ohio. Hallam is one of the bhoys, loves ward politics for the fun, if not the emoluments, and is about as poor as a church mouse. In fact, he owes several hundred dollars for taxes. The two counties, Kenton and Campbell, threw out their hooks for the congressional nomination. Kenton swore by Hallam, while Campbell vowed that the political friend and chum of Carlisle, Cassius M. Clay, Jr., and Charles J. Helm, their own millionaire and boss, Albert S. Berry, should be the nominee. The fight waxed hot. The convention was held at Warsaw, commencing on September 27th, and ending September 30th. The Kenton boys prepared for the fray. The principal preparation consisted in engaging the steamer Henrietta to carry the delegates to Warsaw, and the *carte blanche* orders of Mr. Roth, of the St. Nicholas hostelry, to fill her up from truck to keelson with the best the cellar and the larder of the house afforded. As one delegate remarked: 'Why, the champagne flowed off the decks so much that even the Henrietta was swimming in it.' Hallam and his crowd did all the feasting and the drinking. The Campbell county men were not in it. But the bill was made out to Colonel A. S. Berry. Here is the bill: 'St. Nicholas. Edward N. Roth. Cincinnati, October 10, 1892. Colonel A. S. Berry, per Theodore F. Hallam, to the St. Nicholas Hotel Company, Dr.: For meals, service, wine, and cigars served on board the steamer Henrietta, $865.15.' Then again: 'At Warsaw the battle raged four days. On the last day Colonel Berry and Lawyer Hallam were seen to go arm in arm to the rear of the courthouse, where the convention was held. They had a quiet and confidential chat. At its conclusion Hallam called his warriors about him, and spoke to them in whispers. Immediately thereafter the whole Kenton county delegation cast its vote for Colonel Berry, and he received the nomination. Is Colonel Berry carrying out all and every one of the promises he made? Ah, there's the rub. Mr. Roth, of the St. Nicholas, has sent a bill of $865.15 to Colonel A. S. Berry. That bill is for "dry" and "wet" provisions ordered by Hallam, and disposed of by Hallam's supporters. Such generosity on the part of the victor to the vanquished is truly touching.'"

TAFT, Circuit Judge, (after disposing of several assignments of error.)

Finally we come to those assignments of error which are based on the charge of the court in regard to privileged communications. The court in effect told the jury that the article in question, relating as it did to a matter of public interest, came within a class of communications that was conditionally privileged; that the public acts of public men (and candidates for office were public men) could be lawfully made the subject of comment and criticism, not only by the press, but also by all members of the public, for the press had no higher rights than the individual; but that while criticism and comment, however severe, if in good faith, were privileged, false allegations of fact, as for instance that the candidate had committed disgraceful acts, were not privileged, and if the charges were false, good faith and probable cause were no defense, though they might mitigate damages. Counsel for the plaintiff in error and the defendant below has argued with great vigor and an array of authorities that we ought not to adopt the view of the Circuit Court upon this important question, but should hold that the privilege extends to statements of fact as well as comment.

The argument is this: Privileged communications comprehend all *bona fide* statements in performance of any duty, whether legal, moral, or social, even though of imperfect obligation, when made with a fair and reasonable purpose of protecting the interest of the person making them, or the interest of the person to whom they are made. (Townsh. Sland. & L. § 209.) It is of the deepest interest to the public that they should know facts showing that a candidate for office is unfit to be chosen. Therefore, every one who has reasonable ground for believing, and does believe, that such a candidate has committed disgraceful acts affecting his fitness for the office he seeks, should have the right to give the public the benefit of his information, without making himself liable in damages for untrue statements, unless malice is shown. Though of imperfect obligation, it is said to be the highest duty of the daily newspaper to keep the public informed of facts concerning those who are seeking their suffrages and confidence. Can it be possible, it is asked, that public policy will make privileged an unfounded charge of dishonesty or criminality against one seeking private service, when made to the private individual with whom service is sought, and yet will not extend the same protection to him who in good faith informs the public of charges against applicants for service with them? Is it not, at least, as important that the high functions

of public office should be well discharged, as that those in private service should be faithful and honest?

The *a fortiori* step in this reasoning is only apparent. It is not real. The existence and extent of privilege in communications are determined by balancing the needs and good of society against the right of an individual to enjoy a good reputation when he has done nothing which ought to injure it. The privilege should always cease where the sacrifice of the individual right becomes so great that the public good to be derived from it is outweighed. Where conditional privilege is extended to cover a statement of disgraceful fact to a master concerning a servant or one applying for service, the privilege covers a *bona fide* statement, on reasonable ground, to the master only, and the injury done to the servant's reputation is with the master only. This is the extent of the sacrifice which the rule compels the servant to suffer in what was thought to be, when the rule became law, a most important interest of sociey. But, if the privilege is to extend to cases like that at bar, then a man who offers himself as a candidate must submit uncomplainingly to the loss of his reputation, not with a single person or a small class of persons, but with every member of the public, whenever an untrue charge of disgraceful conduct is made against him, if only his accuser honestly believes the charge upon reasonable ground. We think that not only is such a sacrifice not required of every one who consents to become a candidate for office, but that to sanction such a doctrine would do the public more harm than good.

We are aware that public officers and candidates for public office are often corrupt, when it is impossible to make legal proof thereof, and of course it would be well if the public could be given to know, in such a case, what lies hidden by concealment and perjury from judicial investigation. But the danger that honorable and worthy men may be driven from politics and public service by allowing too great latitude in attacks upon their characters outweighs any benefit that might occasonally accrue to the public from charges of corruption that are true in fact, but are incapable of legal proof. The freedom of the press is not in danger from the enforcement of the rule we uphold. No one reading the newspaper of the present day can be impressed with the idea that statements of fact concerning public men, and charges against them, are unduly guarded or restricted; and yet the rule complained of is the law in many of the States of the Union and in England.

In Davis v. Shepstone, 11 App. Cas. 187, Lord Chancellor HERSCHELL delivered the judgment of the judicial committee of the privy council in an appeal from a judgment for libel recovered in the Supreme Court of Natal. The plaintiff below was a resident commissioner of Great Britain in Zululand, and the alleged libel charged him with having committed unprovoked and altogether indefensible assaults upon certain Zulu chiefs. The publication was made in the colony of Natal, where the conduct of the resident commissioner in Zululand was of great public interest. It was claimed that the article was conditionally privileged, and that the plaintiff ought to have succeeded only on proof of express malice. This claim was denied. The Lord Chancellor thus stated the law:

"There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by the press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or approved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct. In the present case the appellants, in the passages which were complained of as libelous, charged the respondent, as now appears, without foundation, with having been guilty of specific acts of misconduct, and then proceeded, on the assumption that the charges were true, to comment upon his proceedings in language in the highest degree offensive and injurious. Not only so, but they themselves vouched for the statements by asserting that, though some doubt had been thrown upon the truth of the story, the closest investigation would prove it to be correct. In their lordships' opinion there is no warrant for the doctrine that defamatory matter thus published is regarded by the law as the subject of any privilege."

Other English cases laying down the same doctrine are Campbell v. Spottiswoode, 3 Fost. & F. 421, 432, affirmed 3 Best. & S. 769, and Popham v. Pickburn, 7 Hurl. & N. 891, 898. The latest American case, and the most satisfactory, is that of Burt v. Newspaper Co., 154 Mass. 238, 242, where Justice HOLMES discusses the question, and quotes with approval the foregoing passage from the judgment in Davis v. Shepstone. * * * *

Judgment of the Circuit affirmed with costs.

HEBDITCH v. MACILWAINE.

(1894.—2 Q. B. 54.)

Lord ESHER, M. R. In this case the plaintiff has brought an action against the defendants for writing and publishing a libel upon him, the defamatory matter complained of being that he had, when a candidate for the office of guardian for the poor been guilty of treating. It must be borne in mind that the material part of the cause of action in libel is not the writing, but the publication of the libel. It was proved that the defendants had written and published to the board of guardians matter which the jury found to be libelous with regard to the plaintiff and which was untrue. The defendants set up by way of defense that the occasion was privileged. It is for the defendant to prove that the occasion was privileged. If the defendant does so, the burden of showing actual malice is cast upon the plaintiff, but unless the defendant does so, the plaintiff is not called upon to prove actual malice. The question whether the occasion is privileged, if the facts are not in dispute, is a question of law only, for the judge, and not for the jury. If there are questions of fact in dispute upon which this question depends, they must be left to the jury, but where the jury have found the facts, it is for the judge to say whether they constitute a privileged occasion. * * * It was argued that, although the board of guardians had no power or duty or interest in the matter, nevertheless the occasion was privileged, because the defendants honestly and reasonably believed that the board had such a duty or power or interest and were asking them for redress in the matter, which they believed they could give. [The defendants were ratepayers and had a right to vote at the election.—Ed.] Assuming that the defendants had such a belief, though I confess I cannot see how there could be any reason in such a belief, the argument in substance seems to come to this; that the belief of the defendants that the occasion was privileged makes it privileged. I cannot accept the proposition so put forward. I cannot see how the belief of the defendants, who have made a mistake, and have published a libel to persons who have no interest or duty or power in the matter, can affect the question. The belief of the defendants might have a bearing on the question of malice; if it be assumed that the occasion was privileged, the belief of the defendants might be strong to show

that the communication was privileged, as being made without malice, but I do not think it has anything to do with the question whether the occasion was privileged. Reliance was placed rather on authority than on principle in support of the contention for the defendants. * * * The only case which really seems to me to be a strong authority in favor of the defendants' contention is the case of Tompson v. Dashwood (11 Q. B. D. 43). There the judges distinguish between the writing and the publication of the libel, and speak of the writing as having been on a privileged occasion. I cannot follow their reasoning. The cause of action in libel is, as I said at the beginning of my judgment, not the writing but the publication of the libel; and the question is not whether the writing, but whether the publication is on a privileged occasion. The only way to deal with that case, in my opinion, is to say that we do not agree with it, and that it is wrongly decided. Therefore in the present case, when it was proved to the judge that the libel was published by the defendants to the board of guardians, who had no interest in the matter nor any duty or power to deal with it, then without more he ought to have held that the occasion was not privileged, and there was no further question to try as to privilege.[1]

[1] Concurring opinions were delivered by Smith and Davey, LL. J., the latter of whom said "the judgment in Tompson v. Dashwood cannot be supported." Morey v. Morning Journal Association, 123 N. Y. 207; Gricbel v. Rochester Co., 60 Hun. 319, *accord*; Hanson v. Globe Co., 159 Mass. 293, *contra*; but see dissenting opinion by Holmes, J., in which Morton and Barker, concurred.

Fair comment was defined as follows in Christie v. Robertson, 10 New S. Wales L. R. 157, 161 (1889); "Real comment is merely the expression of opinion. Misdescription is a matter of fact. If the misdescription is such an unfaithful representation of a person's conduct as to induce people to think that he has done something dishonorable, disgraceful and contemptible, it is clearly libelous. To state accurately what a man has done, and then to say that in your opinion such conduct is dishonorable, or disgraceful, is comment which may do no harm, as every one can judge for himself whether the opinion expressed is well founded or not. Misdescription of conduct, on the other hand, only leads to one conclusion detrimental to the person whose conduct is misdescribed, and leaves the reader no opportunity of judging for himself of the conduct condemned, nothing but a false picture being presented for judgment."

CHAPTER XI.

TRESPASS TO PROPERTY.

GARRETT v. SEWELL.

(108 Al. 521 : 18 So. 787, 1895.)

McCLELLAN, J. This action is prosecuted by Mrs. Garrett against Sewell for the removal of a partition fence on the line of their adjoining lands. The complaint contains three counts. The first is in trover, claiming damages for the conversion of the rails of which the fence was constituted; and the second and third are in trespass, differing from each other in substance only, in that the second charges that the entry upon the lands of the plaintiff and removal of said fence was wrongful and malicious, while the third does not aver malice. The verdict of the jury was for the plaintiff on all the issues presented, with assessment of damages in this language: "We, the jury, find the issues in favor of the plaintiff, and assess the damages at three and 26-100 dollars." There was judgment for plaintiff for this sum as damages, and for an equal sum as costs, and for the defendant for the balance of the costs (Code, § 2838); and from the judgment plaintiff prosecutes this appeal.

All the issues having been found in favor of the plaintiff, it is manifest that she has no ground of complaint against the judgment below, except in respect of the assessment of damages. The plaintiff proposed to show by a witness that he (the witness) saw stock in the field from around which the defendant had removed the fence, and on the crop there growing. The court refused to allow this proof to be made. Had the plaintiff been allowed to pursue this line of evidence, we cannot know but that material damage to the crop would have been shown. Such damage is an element of recovery under the counts in trespass. The rule is thus stated: "The wrongdoer is responsible for the consequences which flow

immediately from his wrongful or negligent acts, and the responsibility is not relieved by the fact that the consequences of the injurious act could have been prevented by the care or skill of the injured party." 26 Am. & Eng. Enc. Law, p. 677. This fence was there, and the plaintiff, according to the verdict of the jury, had a right to have it remain there, for the sole purpose of protecting her fields and crops from the incursions and depredations of live stock. Its wrongful removal defeated this sole object of its existence, and was the direct cause of the depredations sought to be proved, and these the immediate, not remote, uncertain, and speculative, consequences of the wrong. The court erred to plaintiff's prejudice in the exclusion of this testimony. And this is the only error we find in the record having any relation to the question or measure of damages.

* * * * *

The only argument made here for the appellee goes to the proposition that on the undisputed evidence the general charge should have been given for the defendant, and that, of consequence, any error committed by the trial court was without injury to the plaintiff. This argument is based upon two assumptions of fact, neither of which, we think, is supported by the record. In the first place, it is insisted that the evidence without conflict shows that the land upon which the fence stood in part was in the possession of a tenant of the plaintiff at the time of the alleged trespass. If this were so, of course the plaintiff could not recover under the second and third counts. But the evidence is in conflict on the point. Garrett, the plaintiff's husband, testifies that no part of the land inclosed on one side by this fence was rented at the time the fence was removed, but that a tenant for the previous year, who was living in the house at the time, was there only temporarily, until he could get another place for the current year, occupied for this purpose only by permission of the plaintiff, and in accordance with this purpose moved out, and left the premises, a few days after the removal of the fence. If the jury believed this evidence, they should have found that the plaintiff, and not this former tenant, was in possesion of the land from which the fence was removed.

The second assumption of fact in this position of appellee is that there is no evidence that the defendant ever entered upon the land of the plaintiff in the removal of the fence, but, to the contrary, the evidence affirmatively shows that he did not. This assumption is also, we think, gratuitous. There is abundant evidence that the

fence was on the line between the parties,—a partition fence, established and recognized as such for more than ten years before its removal. It was, therefore, necessarily partly on the land of both the adjoining proprietors. In removing this fence, in taking away the rails of which it was built, and which rested in part in actual contact with the soil which belonged to the plaintiff, and were supported thereby equally with defendant's land, the defendant necessarily "entered upon" the plaintiff's land, though he may have all the while stood and walked upon his side of the line, and though his feet may not have touched the earth on plaintiff's side. We attach no importance to the fact that in going to the place where the fence stood for the purpose of removing it the defendant and his employees passed over another part of the plaintiff's land. The trespass charged was not committed upon this other land; it may have been only a few yards wide and ten miles away; and, if the fact of entry upon plaintiff's land depended upon this testimony, we should say there was no evidence of the fact.

Reversed and remanded.

DOUGHERTY v. STEPP.

(1 Dev. & Battle, (18 N. C.) 871.—1835.)

This was an action of trespass *quare clausum fregit*, tried at Buncome on the last circuit, before his Honor Judge MARTIN. The only proof introduced by the plaintiff to establish an act of trespass was, that the defendant had entered on the unenclosed land of the plaintiff, with a surveyor and chain carriers, and actually surveyed a part of it, claiming it as his own, but without marking trees or cutting bushes. This his Honor held not to be a trespass, and the jury, under his instructions, found a verdict for the defendant, and the plaintiff appealed.

RUFFIN, C. J. In the opinion of the court, there is error in the instructions given to the jury. The amount of damages may depend on the acts done on the land, and the extent of injury to it therefrom. But it is an elementary principle that every unauthor-

ized, and therefore unlawful, entry into the close of another is a trespass. From every such entry against the will of the possessor the law infers some damage; if nothing more, the treading down the grass or the herbage, or, as here, the shrubbery. Had the *locus in quo* been under cultivation or enclosed, there would have been no doubt of the plaintiff's right to recover. Now our courts have for a long time past held that, if there be no adverse possession, the title makes the land the owner's close. Making the survey and marking trees, or making it without marking, differ only in the degree, and not in the nature of the injury. It is the entry that constitutes the trespass. There is no statute nor rule of reason that will make a willful entry upon the land of another, upon an unfounded claim of right, innocent, which one who set up no title to the land could not justify or excuse. On the contrary, the pretended ownership aggravates the wrong. Let the judgment be reversed, and a new trial granted.

Per Curiam. *Judgment reversed.*

[1] *Accord*, Norvell v. Thompson, 2 Hill (S. C.) 470 (1834). In this case, the trial judge charged the jury, that, if there were actually no damage done, or if it were so inconsiderable that it could not be estimated, as the defendant set up no claim to the land, and supposed he had permission of the real owner, they might find a verdict for the defendant; and they did so. This charge was held to be erroneous.

In Anonymous, Year Book, 6 ed. iv. f. 7, pl., 18. (Common Pleas, 1466,) Choke, C. J., said: "And, sir, if the thorns on a great tree had fallen on his land by force of the wind, in this case he might have come in to get them, because the falling was not his act, but by force of the wind, etc. 21 Hen. VII. fol. 28." Cf. Lyman v. Hale, 11 Conn. 177; Hoffman v. Armstrong, 48 N. Y. 201.

In Bailey v. Chic. M. & St. Paul Ry., 3 S. Dak, 531, 54 N. W. 596, 19 L. R. A. 653, (1893) with valuable note, it is held that where trees are destroyed or taken by a trespasser, the owner may sue for the injury to the realty, in which case the measure of damages is the diminished value of the realty; or he may sue for the value of the trees, when the measure of damages will be their market value.

HAY v. THE COHOES CO.

(2 N. Y. 159.—1849.)

Hay sued the Cohoes Company, a corporation chartered by act of the Legislature (Stat. 1826, p. 72) in the Court of Common Pleas of Albany county. The declaration, which was in case, alleged, among other things, that the defendants at, etc., by their agents and servants, wrongfully and unjustly blasted and threw large quantities of earth, gravel, slate and stones upon the dwelling house and premises of the plaintiff, and shut and darkened the windows of said house, obstructed the light, and broke the windows, doors, etc., to the damage of the said plaintiff. Plea, not guilty. On the trial the plaintiff gave evidence tending to prove his declaration, and, among other things, that the agents of the defendants, in excavating a canal upon land of which they claimed to be owners, knocked down the stoop of his house and part of his chimney, and, as it appeared, for the purpose of protection, placed boards, or rough window blinds, on all the front windows of the plaintiff's house, by which the light was obstructed, etc. The defendants moved for a nonsuit, and, among other things, insisted that to make them liable it was incumbent on the plaintiff both to aver and prove that there was negligence, unskillfulness, wantonness or delay, and this the plaintiff had failed to do. The Court of Common Pleas nonsuited the plaintiff, to which an exception was taken. On error brought, the Supreme Court reversed the judgment, and granted a new trial (see 3 Barb. Sup. Court Rep. 42), from which decision the defendants appealed to this court.

GARDINER, J. The defendants insist that they had the right to excavate the canal upon their own land, and were not responsible for injuries to third persons, unless they occurred through their negligence and want of skill, or that of their agents and servants.

It is an elementary principle in reference to private rights that every individual is entitled to the undisturbed possession and lawful enjoyment of his own property. The mode of enjoyment is necessarily limited by the rights of others; otherwise it might be made destructive of their rights altogether. Hence the maxim *sic utere tuo*, etc. The defendants had the right to dig the canal. The

plaintiff has the right to the undisturbed possession of his property. If these rights conflict the former must yield to the latter, as the more important of the two, since, upon grounds of public policy, it is better that one man should surrender a particular use of his land than that another should be deprived of the beneficial use of his property altogether, which might be the consequence if the privilege of the former should be wholly unrestricted. The case before us illustrates this principle. For, if the defendants, in excavating their canal, in itself a lawful use of the land, could, in the manner mentioned by the witnesses, demolish the stoop of the plaintiff with impunity, they might, for the same purpose, in the exercise of reasonable care, demolish his house, and thus deprive him of all use of his property.

The use of land by the proprietor is not therefore an absolute right, but qualified and limited by the higher right of others to the lawful possession of their property. To this possession the law prohibits all direct injury, without regard to its extent or the motives of the aggressor. A man may prosecute such business as he chooses upon his premises, but he cannot erect a nuisance to the annoyance of the adjoining proprietor, even for the purpose of a lawful trade. Aldred's Case, 9 Coke, 58. He may excavate a canal, but he cannot cast the dirt or stones upon the land of his neighbor, either by human agency or the force of gunpowder. If he cannot construct the work without the adoption of such means, he must abandon that mode of using his property, or be held responsible for all damages resulting therefrom. He will not be permitted to accomplish a legal object in an unlawful manner. * * * In this case the plaintiff was in the lawful possession and use of his property. The land was his, and, as against the defendant, by an absolute right from the center *usque ad coelum*. The defendants could not directly infringe that right by any means or for any purpose. They could not pollute the air upon the plaintiff's premises, Morley v. Pragnell, Cro. Car. 510, nor abstract any portion of the soil, Rol. Abr. 565, note; 12 Mass. 221, nor cast anything upon the land, Lambert v. Bessy, Sir. T. Raymond, 421, by any act of their agents, neglect or otherwise. For this would violate the right of domain. Subject to this qualification the defendants were at liberty to use their land in a reasonable manner, according to their pleasure. If the exercise of such a right upon their part operated to restrict the plaintiff in some particular mode

of enjoying his property, they would not be liable. It would be *damnum absque injuria.*

No one questions that the improvement contemplated by the defendants upon their own premises was proper and lawful. The means by which it was prosecuted were illegal notwithstanding. For they disturbed the rightful possession of the plaintiff and caused a direct and immediate injury to his property. For the damages thus resulting the defendants are liable. Without determining the other questions discussed upon the argument we think, upon the ground above stated, that the judgment of the Supreme Court should be affirmed.

Judgment affirmed.

BOOTH v. ROME RY.

(140 N. Y. 267.—1893.)

ANDREWS, C. J. We entertain no doubt of the correctness of the ruling at the circuit that the defendant stands in no better position in defending the action than if the controversy was between individuals. The rule that the Legislature may, in the public interest and for public purposes, authorize and legalize acts causing consequential injury to private property, not amounting to a taking, without providing compensation, and that the legislative authority may be pleaded in bar of any claim for indemnity, although if the act had been done without such authority an action would lie, has no application to acts of a railroad or other private corporation in the execution of chartered or statutory powers. The rule adverted to, although operating in some cases with great severity, which compels an individual to bear a special loss for the benefit of the community at large, in place of distributing the burden, is an application of the maxim, "*salus populi est suprema lex*," and rests upon the transcendent power of the Legislature, within constitutional limitations, to enact whatever it may deem essential to the public welfare. But while there are decisions which give countenance to the view that an authority conferred upon a railroad corporation to construct a railroad carries with it immunity from liability in executing the work for consequential damage to private property, to the same ex-

tent as pertains to the sovereign in executing public works, Bellinger v. Railroad Co., 23 N. Y. 42, it is now the settled doctrine in this State that the powers granted to such corporations are to be construed as privileges conferred, but upon the understanding that they shall be exercised in strict conformity to private rights, and under the same responsibility as though the acts done in execution of such powers were done by an individual. Cogswell v. Railroad Co., 103 N. Y. 10. This doctrine accords with reason, and with the presumed intention of the Legislature. The franchises of a railroad corporation are conferred in consideration of supposed public benefits which will result from the construction of its road. The projectors of such an enterprise are moved by considerations of personal advantage. To acquire corporate character and privileges, they are willing to subject themselves to certain public duties. But it is quite unreasonable that in executing its corporate powers the corporation should be exempted from liability for injuries to private property, as though it was acting as a strictly public agent. There may be limited exceptions, as in cases of highway crossings, where an adjustment of the grade becomes necessary, working a consequential injury to adjacent landowners, which is remediless; and the legislative authority will also bar any remedy for certain discomforts consequent upon the necessary operation of the road, such as noise and smoke of passing trains. We therefore agree with the courts below that the right of the plaintiff to recover in this case, and the liability of the defendant, depend upon the same rule as would govern the parties if both were natural persons, and the injury to the plaintiff's dwelling had resulted from blasting by an adjacent owner on his land in the course of adapting it to individual uses.

The plaintiff, upon the findings of the jury, sustained a serious injury. It is true that witnesses on the part of the defendant gave evidence tending to show that the house was imperfectly constructed, and that the foundation walls were giving away before the excavation was commenced. But, the verdict having been affirmed by the General Term, there can be no controversy here that the blasting caused damage to the house to the amount of the verdict. But mere proof that the house was damaged by the blasting would not alone sustain the action. It must further appear that the defendant, in using explosives, violated a duty owing by him to the plaintiff in respect of her property, or failed to exercise due care.

Wrong and damage must concur, to create a cause of action. If the injury was occasioned by the omission to use due care, this alone would sustain the action, even if the right of the defendant to use explosives in removing the rock was conceded. If one, by carelessness in making an excavation on his own land, causes injury to an adjoining building, even where the owner of the house has no easement of support, he will be liable. Leader v. Moxton, 3 Wils. 460; Lawrence v. Railway Co., 16 Adol. & E. (N. S.) 643–653; Leake, Real Prop. 248. The law exacts from a person who undertakes to do even a lawful act on his own premises, which may produce injury to his neighbor, the exercise of a degree of care measured by the danger, to prevent or mitigate the injury. The defendant could not conduct the operation of blasting on its own premises, from which injury might be apprehended to the property of his neighbor, without the most cautious regard for his neighbor's rights. This would be reasonable care only under the circumstances. If it was practicable, in a business sense, for the defendant to have removed the rock without blasting, although at a somewhat increased cost, the defendant would, we think, in view of the situation, and especially after having been informed of the injury that was being done, have been bound to resort to some other method. There is evidence that rock from some parts of the excavation was loosened by the use of iron bars, and, if this was practicable as to all of it, the jury might well have found that this means should have been adopted. So, also, if less powerful blasts might have been used, which, if used, would not have occasioned injury, or would have lessened it, the omission to use them might well be considered as negligence. The mode of exercising a legal right, where there is a choice of means, may of itself give a cause of action. The plaintiff, however, on this record, is precluded from claiming that the judgment may be sustained because of negligence in the mode of blasting. It must be assumed from concessions made on the trial, and from the rule of law laid down by the court, that blasting was the only mode of removing the rock practically available, that it was conducted with due care, and that it was necessary to enable the defendant to conform the roadbed to the established grade. This is a case, therefore, of unavoidable injury to the plaintiff's house, occasioned by the act of the defendant in blasting on his own premises in order to adapt them to a lawful use; the mode adopted being the only practicable one, and the work having

been prosecuted with due care and without negligence. The question is whether the act of the defendant, connected with the resulting injury, was a legal wrong, for which the plaintiff has a right of action.

The general rule that no one has absolute freedom in the use of his property, but is restrained by the co-existence of equal rights in his neighbor to the use of his property, so that each, in exercising his right, must do no act which causes injury to his neighbor, is so well understood, is so universally recognized, and stands so impregnably in the necessities of the social state, that its vindication by argument would be superfluous. The maxim which embodies it is sometimes loosely interpreted as forbidding all use by one of his own property, which annoys or disturbs his neighbor in the enjoyment of his property. The real meaning of the rule is that one may not use his own property to the injury of any legal right of another. The cases are numerous where the lawful use of one's property causes injury to adjacent property, for which there is no remedy, because no right of the adjacent owner is invaded, although he suffers injury. The cases of excavation furnish a striking illustration. The easement of natural support of the land of one by the land of the adjacent owner applies only to lands in their natural condition, and does not extend so as to give the owner of a building erected on the confines of his land the right to have it supported laterally by the land of his neighbor; and so it has become the settled doctrine of the law that if one, by excavating on his own land adjacent to the land of his neighbor, using due care, causes a building on his neighbor's land to topple over, there is no remedy, provided the weight of the building caused the land on which it stood to give way. There is, in the case supposed, injury, but no wrong, because what was done by the adjacent owner was in the lawful and permitted use of his own property. Wyatt v. Harrison, 3 Barn. & Adol. 871; Partridge v. Scott, 3 Mees. & W. 220; Lasala v. Holbrook, 4 Paige, 170; Thurston v. Hancock, 12 Mass. 220.

The fundamental proposition upon which the plaintiff's counsel rests his argument in support of the recovery is that the use of the explosives in blasting constituted, under the circumstances, a private nuisance, and that, according to the general rule of law, one who creates or maintains a nuisance is liable for any special injury to person or property resulting therefrom. The right of the defendant to excavate on its land for its roadbed is not challenged, but the

right to use the destructive agency of gunpowder in the work of excavation, liable to produce injury, and which did occasion it, is denied. The exception is not to the thing done, but to the mode of doing it. It is to be observed, however, that, under the concessions in the case and the rulings on the trial, it must be assumed that the excavation could not have been done except by the use of explosives. This mode of doing the work was therefore of the substance of the right, if the right existed at all. It has been frequently said that the right of an owner of land to use his property as he likes does not justify the maintaining of a nuisance or the commission of a trespass; and Blackstone, after stating that where one, by smelting works on his own land, causes noxious vapors, which injure the corn or grain on his neighbor's land or damage his cattle, this would be a nuisance, proceeds to say "that if you do any other act in itself lawful, which yet being done in that place, necessarily tends to the damage of another's property, it is a nuisance, for it is incumbent on him to find some other place to do that act, where it will be less offensive." (2 Bl. Comm. c. 13, p. 218.) There are many illustrations in the books of the doctrine stated by the learned commentator, that the use of one's own land for the purpose of a lawful trade may become a nuisance to his neighbor. But whether a particular act done upon, or a particular use of, one's own premises, constitutes a violation of the obligations of vicinage, would seem to depend upon the question whether such act or use was a reasonable exercise of the right of property, having regard to time, place, and circumstances. It is not everything in the nature of a nuisance which is prohibited. There are many acts which the owner of land may lawfully do, although they bring annoyance, discomfort, or injury to his neighbor, which are *damnum absque injuria.* The case of the building caused to fall by an excavation in an adjoining lot, already referred to, is an illustration. The right of an owner of a mine to excavate the mineral in his mine, although by so doing it causes the water to collect therein, and to be discharged into an adjacent mine on a lower level, thereby causing damage to the mine of such adjacent owner, is another illustration of a lawful use of property, followed by damage to the property of another, for which no action lies. Smith v. Kenrick, 7 C. B. 515; Baird v. Williamson, 15 C. B. (N. S.) 376; Wilson v. Waddell, 2 App. Cas. 95. In referring to these cases in Hurdman v. Railway Co., 3 C. P. Div. 168, the court said: "The owner of lands holds his right to the

enjoyment thereof subject to such annoyance as is the consequence of what is called the 'natural use by his neighbor of his land,' and that, where an interference with his enjoyment by something in the nature of a nuisance is the cause of complaint, no action can be sustained, if this is the result of a natural use by a neighbor of his land." Whether a particular act or thing constitutes a nuisance may depend on the circumstances and surroundings. The use of premises for mechanical or other purposes, causing great noise, disturbing the peace and quiet of those living in the vicinity, and rendering life uncomfortable, or filling the air with noxious vapors, or causing vibration of the neighboring dwellings, constitutes nuisances, and such use is not justified by the right of property. Fish v. Dodge, 4 Denio, 311; McKeon v. See, 51 N. Y. 300; Cogswell v. Railroad Co., *supra*. These and like cases are those where the property of the owner is appropriated to a permanent use, which is a constant and serious interference with the enjoyment by other property owners of their property. But there is a manifest distinction between acts and uses which are permanent and continuous, and temporary acts, which are resorted to in the course of adapting premises to some lawful use. For example, the erection of an iron building adjacent to a dwelling might, for the time being, cause as much noise and discomfort as would arise from conducting the business of finishing steam boilers on adjacent premises; but this would not constitute a nuisance, and the owner of the dwelling would have no remedy. The streets may be obstructed temporarily, subject to municipal regulations, for the deposit of building materials, and the party would not be chargeable with maintaining a nuisance. The test of the permissible use of one's own land is not whether the use or the act causes injury to his neighbor's property, or that the injury was the natural consequence, or that the act is in the nature of a nuisance, but the inquiry is, was the act or use a reasonable exercise of the dominion which the owner of property has by virtue of his ownership over his property? having regard to all interests affected, his own and those of his neighbors, and having in view, also, public policy.

The rule announced by the trial judge, that the use, by an owner of property, of explosives, in excavating his land, is at his peril, and imposes liability for any injury caused thereby to adjacent property, irrespective of negligence, is far-reaching. It would constitute, if sustained, a serious restriction upon the use of property, and in

many cases greatly impair its value. The situation in the city of New York furnishes an apt illustration. The rocky surface of the upper part of Manhattan island makes blasting necessary in the work of excavation, and, unless permitted, the value of lots, especially for business uses, would be seriously affected. May the man who has first built a store or warehouse or dwelling on his lot, and has blasted the rock for a basement or cellar, prevent his neighbor from doing the same thing, when he comes to build on his lot adjoining, on the ground that by so doing his own structure will be injured? Such a rule would enable the first occupant to control the uses of the adjoining property, to the serious injury of the owner, and prevent, or tend to prevent, the improvement of property. The first occupant, in building on his lot, exercised an undoubted legal right. But his prior occupation deprived his neighbor of no legal right in his property. The first occupant acquires no right to exclude an adjoining proprietor from the free use of his land, nor to use his own land to the injury of his neighbor subsequently coming there. Platt v. Johnson, 15 Johns. 213; Thurston v. Hancock, *supra;* Tipping v. Smelting Co., 1 Ch. App. 66; Campbell v. Seaman, 63 N. Y. 568. The fact of proximity imposes an obligation of care, so that one engaged in improving his own lot shall do no unnecessary damage to his neighbor's dwelling; but it cannot, we think, exclude the former from using the necessary and usual means to adapt his lot to any lawful use, although the means used may endanger the house of his neighbor.

We have found no case directly in point upon the interesting and important practical question involved in this appeal. It was held in the leading case of Hay v. Cohoes Co., 2 N. Y. 159, that the right of property did not justify the owner of land in committing a trespass on the land of his neighbor by casting rocks thereon in blasting for a canal on his own land for the use of his mill, although he exercised all due care in executing the work. In that case there was a physical invasion by the defendant of the land of the plaintiff. This, the court held, could not be justified by any consideration of convenience or necessity connected with the work in which the defendant was engaged. In the conflict of rights the court considered that public policy required that the right of the defendant to dig the canal on his own land must yield to the superior right of the plaintiff to be protected against an invasion of his possession by the act of the defendant. The case of Benner v. Dredging Co., 134 N. Y.

156, was the case of an injury to the plaintiff's house, resulting from the jarring caused by the blasting of rocks in Hell Gate; and it was held that the injury was remediless, for the reason that the defendant was acting under the authority of the Government of the United States, by virtue of a contract authorized by Congress. It has been held that the keeping of gunpowder in large quantities near inhabited dwellings is a nuisance, and in the case of explosion subjects the party keeping it to liability for damages occasioned thereby. Myers v. Malcolm, 6 Hill, 292; Heeg v. Licht, 80 N. Y. 579. So, also, it has been held that the working of quarries by the use of gunpowder, to the injury of property in the vicinity, gives a right of action. City of Tiffin v. McCormack, 34 Ohio St. 638; Scott v. Bay, 3 Md. 431. Many of the cases cited by the counsel are cases of the permanent appropriation of property, for damages, or noxious uses causing damage. The distinction between such cases and those where the injury arises from acts done in the necessary adjustment of property for a lawful use by means necessary, and not unusual, but involving damage to adjacent property, has been adverted to. We recognize the difficulty of formulating a general rule regulating the rights of adjacent landowners in the use of their property, and we realize how narrow the margin is which separates this from some decided cases. In Marvin v. Mining Co., 55 N. Y. 557, the opinion of the learned judge who wrote in that case sustains the conclusion we have reached in this case. But the point was not necessarily involved, since it was held that the defendant there had acquired by grant the right to employ blasting in removing the mineral, and that the plaintiff, a subsequent grantee of the surface, could not complain of injury to his house therefrom, in the absence of negligence on the part of the defendant in conducting the work. Judge Folger, in that case, said: "Whatever it is necessary for him [defendant] to do for the profitable and beneficial enjoyment of his own possession, and which he may do with no ill effect to the adjacent surface in its natural state, that he may do, though it harm erections lately put there." If the learned judge intended to lay down the rule that the owner of land may do anything on his own land which would do no injury to the adjacent property if it had remained in its natural state, the proposition is probably too broad. One may do in a barren waste many things which he could not lawfully do in or near an inhabited town. But the defendant here was engaged in a lawful act. It was done on

its own land, to fit it for a lawful business. It was not an act which, under all circumstances, would produce injury to his neighbor, as is shown by the fact that other buildings near by were not injured. The immediate act was confined to its own land; but the blasts, by setting the air in motion, or in some other unexplained way, caused an injury to the plaintiff's house. The lot of the defendant could not be used for its roadbed until it was excavated and graded. It was to be devoted to a common use; that is, to a business use. The blasting was necessary, was carefully done, and the injury was consequential. There was no technical trespass. Under these circumstances, we think, the plaintiff has no legal ground of complaint. The protection of property is doubtless one of the great reasons for government. But it is equal protection to all which the law seeks to secure. The rule governing the rights of adjacent landowners in the use of their property seeks an adjustment of conflicting interests through a reconciliation by compromise, each surrendering something of his absolute freedom so that both may live. To exclude the defendant from blasting to adapt its lot to the contemplated uses, at the instance of the plaintiff, would not be a compromise between conflicting rights, but an extinguishment of the right of the one for the benefit of the other. This sacrifice, we think, the law does not exact. Public policy is sustained by the building up of towns and cities and the improvement of property. Any unnecessary restraint on freedom of action of a property owner hinders this. The law is interested, also, in the preservation of property and property rights from injury. Will it, in this case, protect the plaintiff's house by depriving the defendant of his right to adapt his property to a lawful use, through means necessary, usual, and generally harmless? We think not.

The judgment should be reversed, and a new trial ordered, with costs to abide the event.

DEVLIN v. SNELLENBURG.

(132 Pa. St. 186.—1890.)

On November 3, 1877, John Devlin brought trespass against Joseph Snellenburg, Nathan Snellenburg and others, trading as N. Snellenburg & Co. Issue. At the trial on April 1, 1889, it was

made to appear that the defendants, who were clothiers in the city of Philadelphia, had employed one William D. Johnson to paint their advertisements upon blank walls and other places in the city; that in his employment said Johnson had painted an advertisement for them upon the wall of the property belonging to the plaintiff, which at the time was in the possession of a tenant under a three years' lease, and that the tenant authorized the painting of the sign in consideration of $6 paid to her by the defendants. Testimony was introduced by both parties as to the cost of obliterating the advertisement, the necessity of painting it out and of subsequently repainting the wall, etc., and whether the advertisement could be washed out with an application of caustic soda and water.

PER CURIAM. If as alleged by the defendants, the wall in question was painted by the consent of the tenants in possession, it might render the latter liable to the plaintiff, but it would not relieve the defendants. If the wall was injured, and the jury have so found, it was an injury to the reversion, and the owner thereof may have his action on the case therefor. Ripka v. Sergeant, 7 W. & S. 9; Schnable v. Koehler, 28 Pa. 181; McIntire v. Coal Co., 118 Pa. 108.

The defendant, Joseph J. Snellenburg, having testified when on the stand that the wall was painted by his order and direction, it was not error for the learned judge to instruct the jury that "no matter what conclusion you come to in the case, the plaintiff is entitled to your verdict." * * * *

Judgment affirmed.[1]

[1] In Kreuger v. Wis. Tel. Co., 106 Wis. 96, 81 N. W. 1041, 50 L. R. A. 298 (1900), the court held that the erection and maintenance of a telephone pole in a highway, without the consent of the abutting owner, and in front of his shop window, constituted a continuing trespass and warranted the intervention of the court; citing the following cases: Eels v. Telegraph Co., 149 N. Y. 133, 38 N. E. 202, 25 L. R. A. 640; Telegraph Co. v. Barnett, 107 Ill. 507; Telegraph-Cable Co. v. Eaton, 170 Ill. 513, 49 N. E. 365, 39 L. R. A. 722; Telegraph Co. v. Pearce, 71 Md. 535, 18 Atl. 910, 7 L. R. A. 200; Telegraph Co. v. Williams, 86 Va. 696, 11 S. E. 106; Telephone Co. v. Mackinzie, 74 Md. 36, 21 Atl. 690; Blashfield v. Telegraph Co., 71 Hun, 532, 24 N. Y. Supp. 1006; Smith v. Telegraph Co., 2 Ohio Cir. Ct. R. 259; Stowers v. Telegraph-Cable Co., 68 Miss. 559, 9 South. 356, 12 L. R. A. 864; Telegraph Co. v. Irvine (C. C.) 49 Fed. 113; Nicoll v. Telephone Co. (N. J. Err. & App.) 42 Atl. 583; Hewett v. Telegraph Co., 13 Wash. Law Rep. 466.

MORGAN v. HUDNELL.

(52 Oh. St. 552: 40 N. E. 716.—1895)

SPEAR, J. (After stating the facts). The contention of the plaintiff in error is that the charge of the court is wrong, and that there should have been no recovery in favor of Hudnell, because (1) the owner of domestic animals cannot be held liable for injuries committed by them, unless the owner has notice of their vicious propensities; and (2) the plaintiff below, not being in possession of the lot where his horse was being pastured, could not maintain an action of trespass.

Undoubtedly, it is settled law that the owner of a domestic animal is not, in general, liable for an injury committed by such animal while in a place where it rightfully may be, unless it is shown that the animal was vicious in the particular complained of, and that the owner had notice of such vicious propensity. But we regard it as equally well settled that if the animal breaks into the close of another, and there damages the real or personal property of one in possession, the owner of the trespassing animal is liable, without reference to whether such animal was vicious, and without reference to whether such propensity was known to the owner, for the law holds a man answerable, not only for his own trespass, but for that of his domestic animal. The natural and well-known propensity of horses, as well as other cattle, is to rove, and the owner is bound to confine them on his own land; so that, if they escape, and do mischief on the land of another, under circumstances where the other is not at fault, the owner ought to be liable. Beckwith v. Shordike, 4 Burrows, 2092; Angus v. Radin, 5 N. J. Law, 815; Dolph v. Ferris, 7 Watts & S. 367; 3 Bl. Comm. 211. * * * Stated in brief, the case is this: The plaintiff's horse was in a close where the owner, having rightful enjoyment, had a right to keep him. He had a right in the field. The defendant's horse, by breaking the fence which his landlord was bound to maintain, became a trespasser, and, while thus unlawfully invading the close as a trespassing animal, inflicted the damage to plaintiff's property. For such wrong we think the law should, and does, afford a remedy.

In this view, the charge of the court was right, and the judgment will be affirmed.[1]

[1] In Decker v. Gamman, 44 Me. 332, it is said: "There are three classes of cases

MERRITT v. HILL.

(87 Pac. R. 893.—104 Cal. 184.—1894.)

VANCLIFF, C. The substance of the complaint in this action is that, while plaintiffs were owners and in possession of about eight sections of land in Trinity County (not alleged to have been inclosed), "defendants' cattle and horses ran and trespassed upon said lands, ate up, injured, and destroyed the grass, hay, and verdure being and growing thereon," to the damage of plaintiffs in the sum of $1,000. It is not alleged that the trespass was instigated by defendants, nor that defendants had notice thereof. A demurrer to the complaint on the ground that it does not state a cause of action was sustained by the court, and, plaintiffs having declined to amend their complaint, judgment passed for the defendants. Plaintiffs bring this appeal from the judgment on the judgment roll, and contend that "at common law the rule was that every man must, at his peril, keep his cattle on his own land; and if he fails he is liable for their trespass on the land of others, whether fenced or unfenced;" citing 3 Bl. Comm. 211; Cooley, Torts, 337; Pol. Code, § 4468.

In 1850 the Legislature of this State enacted that "the common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of the State of California, shall be the rule of decision in all courts of this State;" and section 4468 of the Political Code is to the same effect. Yet it has been held in several cases that the common law rule as to trespassing animals, claimed by appellants to be applicable to this case, is inconsistent with certain general legislative acts

in which the owners of animals are liable for injuries done by them to the persons or the property of others. 1. The owner of wild beasts, or beasts in their nature vicious, is under all circumstances, liable for injuries done by them. * * * 2. If domestic animals, such as oxen and horses, injure any one in person or property, if they are rightfully in the place where they do the mischief, the owner of such animals is not liable for such injury unless he knew that they were accustomed to do mischief. * * * 3. The owner of domestic animals, if they are wrongfully in the place where they do any mischief, is liable for it, though he had no notice that they had been accustomed to do so before. In cases of this kind the ground of the action is that the animals were wrongfully in the place where the injury was done." Cf. Van Leuven v. Lyke, 1 N. Y. 515, (Damage by trespassing swine.)

which have always been in force in this State, except as repealed by local laws applicable to some particular counties, of which Trinity is admitted not to be one; and therefore that the common law rule invoked by appellants has never been in force in this State. Waters v. Moss, 12 Cal. 538; Comerford v. Dupuy, 17 Cal. 308; Logan v. Gedney, 38 Cal. 581. And the authority of these cases was recognized in Hahn v. Garratt, 69 Cal. 147, the decision of which, however, was governed by a local law, applicable to Santa Clara County alone.

I think the judgment should be affirmed.[1]

[1] It is generally understood that the common law makes a distinction between the liability of an owner of cattle and of an owner of dogs and cats, because (1) of the difficulty of keeping the latter under restraint, (2) of the slightness of the damage ordinarily caused by their wanderings, (3) of the common usage of allowing them a wider liberty, (4) of their not being so absolutely the chattels of the owner as to be the subject of larceny. Read v. Edwards, 17 C. B. (N. S.) 245; Churnot v. Lawson, 43 Wis. 536; Sanders v. Teape, 51 L. T. 263. 29 A. L. J. 321; Buck v. Moore, 35 Hun, 338; but see Doyle v. Vance, 6 Vict. L. R. Cases at Law, 87, *contra*. In the last cited case, the owner of a trespassing dog, which barked at and frightened plaintiff's horse so that he ran away and broke his neck, was held liable to plaintiff for the value of the horse. Stephen, J., said, "It seems to have been considered, in old times, that there was a marked distinction between trespass by a dog, and trespass by an ox. Now, as a general rule, no such distinction is made. I cannot see why there should be any. This case illustrates how far the law ought to be altered, so as to preserve its accordance with change of time and place. Of course, the court cannot alter the clearly expressed language of an act of Parliament, though the reason for it may have ceased, And so also as to actual decisions of the courts. If there is reason to alter the law, the Legislature must do it. But on this question, there have been no more than *obiter dicta* based upon reasons which have no longer any existence. At one time, a dog could not be the subject of a theft. The court is at liberty, within reasonable limits, to meet the changed circumstances of the present day."

In Monroe v. Cannon, 24 Mont. 316, 61 Pac. 863, 81 Am. St. R. 439 with valuable note (1900), the owner of pasture land was held entitled to recover the value of grass consumed by bands of sheep deliberately and intentionally driven on it by the herder in charge of them.

MARLOW v. WEEKES.

(Barnes' Notes of Cases 452.—1744.)

Trespass for assaulting, beating, and wounding plaintiff's mare.

After a verdict for plaintiff, defendant moved in arrest of judgment, objecting, that an action of assault and battery is not applicable to a dead thing, or a brute beast, but to one of the human species only. The objection was now overruled, and the order *nisi causa* discharged. Assault upon a ship (a dead thing) bad; but for an injury to a beast, a writ in trespass *vi et armis* appears in the Register; the beating and wounding are found by the jury.[1]

DEXTER v. COLE.

(6 Wis. 328.—1858.)

The plaintiff declared in trespass, charging the defendant with taking and driving away twenty-two sheep, the property of the plaintiff, to his damage one hundred dollars. Plea, general issue. The cause was tried before a justice of the peace, to a jury; when it appeared from the evidence that the defendant, who is a butcher at Milwaukee, was driving some sheep he had purchased toward the city upon the highway, when they became mixed with a small lot of twenty-two sheep of plaintiff, which were running at large upon the highway. The defendant drove the whole flock into a yard near the road, for the purpose of parting them, and did throw out a number which he did not claim, and pursued his way with the remainder to his slaughter-house at Milwaukee, where they were slaughtered in his business. The evidence tended to show, and the jury found it did show, by the verdict rendered, that some four of the plaintiff's sheep remained in the flock, and were driven to Milwaukee, and slaughtered by defendant. The verdict and judgment before the justice were for the plaintiff. The cause was removed to

[1] Fitzherbert's Natura Brevium, 88 M. and 89, L. shows that the writ of trespass could be had for breaking one's mill-stone, or chasing his sheep or swine to their injury.

the county court of Milwaukee County by writ of *certiorari*. Upon this hearing the county court reversed the judgment of the justice, and rendered a judgment against the plaintiff, before the justice, for costs, to reverse which judgment of the county court this writ of error is brought.

By the court. COLE, J. We have no doubt but the action of trespass would lie in this case. In driving off the sheep, the defendant in error, without doubt, unlawfully interfered with the property of Dexter; and it has been frequently decided that, to maintain trespass *de bonis asportatis*, it was not necessary to prove actual, forcible dispossession of property, but that evidence of any unlawful interference with, or exercise of acts of ownership over, property, to the exclusion of the owner, would sustain the action. Gibbs v. Chase, 10 Mass. 128; Miller v. Baker, 1 Met. 27; Phillips & Brown v. Hall, *et al.*, 8 Wend. 610; Morgan v. Varick, id. 587; Wintringhouse v. La Foy, 7 Cowen, 735; Reynolds v. Shuler, 5 id. 325; 1 Chitty Pl. (11 Amer. Ed.) 170, and cases cited in the notes. Neither is it necessary to prove that the act was done with a wrongful intent, it being sufficient if it was without a justifiable cause or purpose, though it were done accidentally or by mistake. 2 Green. Ev. sec. 622; Grulle v. Snow, 19 J. R. 381. There is nothing inconsistent with these authorities in the case of Parker v. Walrod, 13 Wend. 296, cited upon the brief of the counsel for the defendant in error. * * *

The judgment of the county court is therefore reversed, and the judgment of the justice affirmed.[1]

[1] It is not trespass for one, lawfully driving cattle or sheep on the highway, to drive animals which mix with his, to a convenient place for separating them. VanValkenburg v. Thayer, 57 Barb. (N. Y.) 196 (1870); but it is trespass for him to drive them away with his, without taking reasonable precautions to discover and separate them; Young v. Vaughan, 1 Houst., (Del.) 381 (1857); Brooks v. Olmstead, 17 Pa. 24, (1851).

See Bruch v. Carter, 32 N. J. L. 554 (1867). Defendant untied plaintiff's horse, led him to another post and hitched him. Here, he became entangled in his halter, was thrown to the ground and killed. Judgment upon verdict for plaintiff for the value of the horse affirmed.

Where one takes up an estray, and converts or abuses it, he is a trespasser ab initio.

One who illegally interferes with the possession of a chattel is liable in trespass to the one whose actual possession is invaded, although such possession is illegal.

WHEELER v. LAWSON.

(103 N. Y. 40.—1886.)

DANFORTH, J. Upon these facts this appeal should succeed. The plaintiffs were in actual possession of the property when the defendant, against their will, forcibly seized, removed and sold it. This was enough without any other evidence of title to maintain the action, Stowell v. Otis, 71 N. Y. 36, except against the true owner, or one connecting himself in some way with the true owner. The general denial does not avail the defendant, for justification is not admissible under it. The only defense is in the affirmative answer, which sets up that the property seized belonged to Shoemaker, or Levi Allen as his assignee. So far as this answer merely shows title out of the plaintiffs, it is of no consequence. If the title was in fact in Allen, the defendant does not connect himself with it. He must, therefore, rely on showing title in Shoemaker, against whose property only he has execution. This he does not do. On the contrary the answer asserts that Allen, as assignee of the goods, etc., of Shoemaker, is a necessary party to the action, but no steps appear to have been taken to bring him in, in accordance with this averment. The referee in substance finds that on the 20th of July, 1880, and before the judgment against him was obtained, Shoemaker executed a general assignment of all his property, including that in question, to Allen for the benefit of his creditors, and by necessary implication also finds that on that day he delivered possession of it to his assignee, for he says Shoemaker continued in possession until he executed the assignment. The assignee is not a party to the suit, and the defendant's justification fails because he shows that the title is in Allen, against whom he has no claim. It is conceded that if the judgment creditor were seeking to secure the avails of the mortgaged property by proceeding in the nature of a creditor's bill, and did not attack the assignment as well as the mortgage, then it would not be entitled to relief, because a judgment setting aside the incumbrance by mortgage would not afford the bank any relief, as the property or the avails of it would belong to the assignee, and so it was held by us in Spring v. Short, 90 N. Y. 538. The form of the action is immaterial where the same facts appear. Here they do. The respondent argues that showing title

in Allen will not enable the plaintiffs to sustain the action without that title has been transferred to them. Doubtless that is so. They did not need to show it. Possession was enough, *prima facie,* to sustain the action, but it does appear, however, that possession was taken by Allen's permission.

Besides, as the goods when seized by the defendant were in the actual possession of the plaintiffs, the burden was upon the defendant either to prove title in Shoemaker, or to connect himself with Allen's title, and show that the taking was by his authority, or by virtue of process or right acquired through legal proceedings against him. Merritt v. Lyon, 3 Barb. 110; Demick v. Chapman, 11 Johns. 132; Hurd v. West, 7 Cow. 752. Neither of these things was accomplished. No invalidity is found as to the assignment, nor any unwillingness on the part of the assignee to perform his duty under it. He stands, not a mere representative of the debtor, but of the rights of creditors, and may impeach the assignor's conveyances, although the debtor could not do so. (Laws of 1858, c. 314.) So also as the title to the property passed to Allen by the assignment, he could doubtless, as the defendant's counsel says, maintain his action in trover. He could do so because he was the general owner. But so also could the plaintiffs, because their possession was, upon the finding of the referee, by the permission of the assignee. They had thus a special property or interest in the articles, and a recovery by either would be a bar to an action by the other. But it is enough to defeat the justification set up in this action that at the time the defendant levied, the judgment and execution debtor had no right or interest in the property, it having passed from him by the prior assignment to Allen; and as this was before judgment, so it was of course before execution issued, and the goods were neither actually or constructively bound by it. (2 R. S. 365, sec. 13; Code, sec. 1405.) It is, therefore, unnecessary to consider other questions raised by the appellants, or anticipate how they may stand upon another trial.

The judgment should be reversed and a new trial granted, with costs to abide the event.

Judgment reversed.[1]

[1] See Gutter v. Pac. Steam Whaling Co., 96 Fed. 617 (1899). Seamen on board an abandoned whaling bark successfully maintained trespass against the defendant, whose servants took the stores from the bark, although the seamen had bare possession and no ownership. "The peace and good order

ADAMS v. RIVERS.

(11 Barb. 390.—1851.)

WILLARD, P. J. * * * The plaintiff proved, *prima facie,* that he owned and possessed both the lots mentioned in the complaint. These lots, being bounded by public streets, extended to the center of the street. This is undoubtedly the legal presumption. * * * As was well remarked by Justice COWEN in Pearsall v. Post, 20 Wend. 121, the relative rights both of owner and passenger in a highway, are well understood and familiarly dealt with by the law. Subject to the right of mere passage, the owner of the soil is still absolute master. The horseman cannot stop to graze his steed without being a trespasser; it is only in case of inevitable, or at least accidental detention, that he can be excused even in halting for a moment.

This brings us to the main question in the case, whether the defendant, by using abusive and insulting language to the plaintiff, became a trespasser from the beginning. The testimony authorized the jury to find that the defendant came on to the premises of the plaintiff, covered by the street, not in the legitimate use of the highway as a place of travel, but for the express purpose of abusing him. * * * *

The defendant committed a trespass while standing on the sidewalk by the plaintiff's lot where he lived, and using towards him abusive language. While so engaged he was not using the highway for the purpose for which it was designed, but was a trespasser. He stood there but about five minutes. It was not shown that he stopped on the sidewalk for a justifiable cause; on the contrary, it was rendered probable that it was for a base and wicked purpose. It was, therefore, a trespass. Suppose a strolling musician stops in front of a gentleman's house, and plays a tune or sings an obscene song under his window, can there be a doubt that he is liable in trespass? The tendency of the act is to disturb the peace, to draw

of society," it is declared, "require that persons thus in the possession of property, even without any title, should be enabled to protect such possession, by appropriate remedies against mere naked wrongdoers," citing Jeffries v. G. W. Ry., 5 E. & B. 802, 25 L. J. Q. B. 1071 (1856); Wheeler v. Lawson, 103 N. Y. 40, 8 N. E. 360, (1886).

together a crowd, and to obstruct the street. It would be no justification that the act was done in a public street. The public have no need of the highway but to pass and repass. If it is used for any other purpose not justified by law, the owners of the adjoining land are remitted to the same rights they possessed before the highway was made. They can protect themselves against such annoyances by treating the intruders as trespassers.

The action therefore was strictly supported by the evidence. The jury were not limited to mere compensatory damages, and the court could not have interfered had the recovery been five times as much as it was. Merest v. Harvey, 5 Taunt. 442; Cook v. Ellis, 6 Hill, 495; Hitchcock v. Whitney, 4 Denio, 461.

The judgment of the county court must be reversed and that of the justice affirmed.[1]

ROBBINS v. SWIFT.

(86 Me. 197 : 29 At. 981.—1894.)

EMERY, J. The defendant was a town collector of taxes and, as such, had a legal warrant to collect a legal tax from the plaintiff. After observing the necessary preliminaries the defendant arrested the plaintiff on the tax warrant, for nonpayment of the tax, and committed him to the county jail. In the written certificate of the costs of arresting and committing, given to the jailer as required by statute, the defendant named a sum in gross, and in excess of the amount of the legal fees. The plaintiff, after the commitment, paid the full sum thus certified, and was thereupon released from the imprisonment.

It does not appear in the case that the plaintiff questioned the legality of the sum certified, or that his imprisonment was at all prolonged by the excess of costs certified, or would have been in the least abridged, had they been correctly certified.

[1] In Harrison v. Duke of Rutland (1893) 1 Q. B 142, 62 L. J. Q. B. 118, 47 A. L. J. 329, the plaintiff was held a trespasser *ab initio*, because he stopped on the highway for the purpose of interfering with the defendant's legal right of shooting across it; and the defendant was justified in ordering his servants to use such force as was reasonably necessary to remove the plaintiff from his obstructive position.

The plaintiff has now brought this action of trespass for that arrest and imprisonment. At the trial the defendant conceded that he had injured the plaintiff by demanding and taking excessive fees, as above described, but contended that this action of trespass was not the lawful remedy for such an injury. The presiding justice sustained this contention, and thus practically directed a verdict for the defendant. The plaintiff excepted. The question, therefore, is whether trespass is the proper form of action for this injury.

It is the firmly established rule of our law that any abuse by a ministerial officer of an authority given him by law is remediable by an action of trespass. The reasons for this salutary rule are clearly and correctly stated in Carter v. Allen, 59 Me. 296, and lately affirmed in Railroad Co. v. Small, 85 Me. 462, and need not be repeated here. In accordance with this rule, the following acts have been held to be abuses of authority, and remediable by an action of trespass: The working an estray or a beast distrained. Bagshawe v. Goward, Cro. Jac. 147, cited in Gibbs v. Chase, 10 Mass. 129. The omission to case for impounded beasts. Adams v. Adams, 13 Pick. 384. The placing an unfit person in a house as keeper over goods attached. Malcolm v. Spoor, 12 Metc. (Mass.) 279. Selling attached property when one of the appraisers was interested. McGough v. Wellington, 6 Allen, 505. A delay for five hours to remove goods from the room in which they had been attached. Williams v. Powell, 101 Mass. 467. The omission of a collector of taxes, after a sale of property, to "render an account in writing" of the sale and charges. Blanchard v. Dow, 32 Me. 557. Selling the goods of a firm on an execution against one partner. Moore v. Pennell, 52 Me. 162. The deduction of illegal fees by a tax collector from the proceeds of a tax sale. Carter v. Allen, 59 Me. 296. The selling by a tax collector of more goods than necessary to pay the tax and expenses of sale, although the surplus proceeds were paid over to the plaintiff. Seekins v. Goodale, 61 Me. 400. The omission by the officer attaching hay to leave enough hay for the debtor's cattle. Wentworth v. Sawyer, 76 Me. 434.

The foregoing cases sufficiently illustrate the rule. Was the defendant's act within the rule? Of this there can be little, if any, doubt. He practically demanded and exacted excessive and illegal fees of a prisoner whom he held in official durance. He presumably knew the law, and what were the legal fees. He thus abused his

official power, and under the rule above stated this abuse can be remedied in this action of trespass.

It is urged that the imprisonment does not appear to have been prolonged a single instant by reason of the demand for illegal fees, and that, therefore, the plaintiff's only action is one to recover back the sum wrongfully demanded. The same contention was urged in Carter v. Allen, *supra,* and overruled. In determining whether an act is an abuse of official power, the nature of the act itself is to be looked at, rather than its mere result. The defendant's act was clearly illegal, and an abuse of official power. That the plaintiff did not resist or question it does not make it any the less illegal or abusive. The sharp stress of imprisonment does not encourage a prisoner to question the propriety of official demands made upon him as a condition of his liberty. That he hastens to comply with the illegal demand, rather than suffer further imprisonment, does not purge the demand of its oppressive character as an abuse of official power. * * * *

Exceptions sustained.[1]

[1] In Wyke v. Wilson 173 Pa. 12, 33 At. 701 (1896), the court held that a landlord who elects to distrain the property of a tenant under a statute, but fails to have the appraisement made, which is required by statute, is a trespasser *ab initio;* citing, Kerr v. Sharp, 14 Serg. & R. 399; Quinn v. Wallace, 6 Whart. 452; and Brisben v. Wilson, 60 Pa. St. 452.

In Perry v. Bailey 94 Me. 50, 46 At. 78 (1900), the court said: "Now, the well-known rule is that the owner himself cannot maintain trespass *quare clausum,* unless he was in possession at the time of the alleged trespass; for the gist of the action is the injury to the possessory right. Chadbourne v. Straw, 22 Me. 450; Jones v. Leeman, 69 Me. 489; Kimball v. Hilton, 92 Me. 214, 42 Atl. 394. Therefore the landlord out of possession cannot maintain trespass if the tenant is in possession. Bartlett v. Perkins, 13 Me. 87. A qualification of this rule permits a landlord, while a tenant is in possession, to maintain trespass for injuries to the freehold. Davis v. Nash, 32 Me. 411; Lawry v. Lawry, 88 Me. 482, 34 Atl. 273. But this remedy extends only to acts of trespass. We have said that the entry in this case was by lawful authority. It follows that there was no trespass. Dingley v. Buffum, 57 Me. 379. If it be said that the defendants, in any event, were authorized to pile only 50 tons of stone upon the wharf, and that they occasioned the damage by exceeding their authority, the answer is that an abuse of authority to enter upon land given by a party does not render a man a trespasser. Hunnewell v. Hobart, 42 Me. 565; Dingley v. Buffum, *supra.*"

Trover can be brought for any species of goods, - but for property which plff has no right to possess,

CHAPTER XII.

TROVER AND CONVERSION.

BECKWITH v. ELSEY.

(Clayton 112.—1641.)

In an action of trover and conversion, and nothing proved but a tortious taking of the cattle by way of trespass, and driving them away, and it was ruled a good ground for this present action, and a conversion shall be intended, otherwise when he comes to them by trover, there an actual conversion shall be proved.[1]

AVERILL v. CHADWICK.

(158 Mass. 171.—1891.)

DEVENS, J. We have no occasion to consider whether the rabbits for the conversion of which this action was brought were unlawfully exposed for sale in violation of Pub. St. c. 91, and Acts 1886, c. 276, § 5, nor whether, upon proper proceedings had, they might have been adjudicated to be forfeited. Without so deciding, we assume these positions in favor of the defendant's contentions. His

[1] In Royce, Allen & Co. v. Oakes, 20 R. I. 252, 38 At. 371, 39 L. R. A. 845 (1897) the court said: "While it is customary to incorporate into the declaration the legal fiction that the plaintiff casually lost the goods and chattels described, and that the same afterwards came to defendant's hands by finding, yet we think it is sufficient to allege that they came to his hands generally, the conversion being the gist of the action."

The case holds also, that Trover lies for the conversion of money as well as of napkin rings.

In Bassett v. Maynard, 1 Rolle Abridgment, 105 (M) pl. 5. (1601) it is stated as settled that, "If I cut certain wood, and a stranger takes it out of my possession, although I may have an action of trespass, still I may also have an action on the case [for trover] at my election."

own statement, which, in the present posture of the case, must be taken as correct, does not show him to have been either a constable or police officer, even if these officers could have made a seizure of the property without a warrant, which, again, we do not intend to decide. He was a deputy of the board of inland fisheries and game commissioners, who states that he had orders from them to seize and remove whatever of this nature was offered for sale unlawfully. He did not pretend that he had orders from any court, or any warrant, but took the rabbits to destroy them. It is quite clear that neither the commissioners nor their deputy could, without power, seize, remove, and destroy property, even though the same was unlawfully exposed for sale. No right to do this is given by the statute, nor is any authority cited to us which justifies it.

Even if the taking of the rabbits was unlawful, yet, the possession of them being illegal, it is the contention of the defendant that the plaintiff cannot avail himself of this illegal possession to maintain the action. In Com. v. Rourke, 10 Cush. 397, it is held to be well established at common law that property unlawfully acquired may nevertheless be the subject of larceny, and it is said "that even he who larceniously takes the stolen object from a thief whose hands have but just closed upon it may himself be convicted therefor in spite of the criminality of the possession of his immediate predecessor in crime." In Com. v. Coffee, 9 Gray, 139, where the article stolen was intoxicating liquor purchased in violation of the statute of Massachusetts, and intended to be sold in violation of the act, it was held to be the subject of larceny. Even, therefore, if, as we have assumed, in the case at bar, the defendant might have forfeited and lost his property if it had been seized upon proper legal process, and it had appeared that it was kept for an illegal purpose, he was only to be deprived of it upon such proof and by the methods which the law points out. In the plaintiff's hands the rabbits were strict property, even if unlawfully kept for sale. If deprived of them by a wrongful seizure, the party taking them should be made responsible to him for their value. * * * *

Exceptions overruled.

WHEELER v. LAWSON.

(Reported, Supra. p. 783.)

SHEA v. MILFORD.

(145 Mass. 525.—1888.)

W. ALLEN, J. The property of the plaintiff, alleged to have been converted by the defendants, was on land belonging to and occupied by the defendant town. The town requested the plaintiff to remove the property to another place on the same parcel of land, and the plaintiff refused to do so, whereupon the defendants removed it to the place assigned by the town. The instruction that, if the plaintiff unreasonably neglected to remove the property, and the defendants removed it to another part of the lot, doing no unnecessary damage, the plaintiff could not recover, was sufficiently favorable to the plaintiff, even if he occupied under a license which had not been revoked. The evidence negatived a conversion of the property by the defendants, and showed that they claimed no title to it, assumed no dominion over it, and did nothing in derogation of the plaintiff's title to it, and that all that was claimed by the defendants was the right to remove goods from one place to another on their own land. All that was done was in assertion of their right in the land, and in recognition of the plaintiff's right of property in the chattels. If the plaintiff had the right to occupy the land which he claimed, the act of the defendants was wrongful, and they would be liable to the plaintiff for damages for breach of contract, or for the trespass, but not for the value of property converted to their own use. Farnsworth v. Lowery, 134 Mass. 512; Fouldes v. Willoughby, 8 M. & W. 540; Heald v. Carey, 11 C. B. 977.

It is immaterial whether the plaintiff had an unrevoked license to occupy the land, and we express no opinion upon that question.

Exceptions overruled.

A person who removes the goods of another for his own convenience, and does not restore them to his original position, may be liable in trespass but not in conversion.

ENGLAND v. COWLEY.

(L. R. 8 Ex. 126: 42 L. J. Ex. 80.—1873.)

KELLY, C. B. I am of opinion that this rule should be discharged. The defendant, in my judgment, never converted these goods to his own use. The plaintiff was himself in actual possession of them, and all the defendant did was to say, "Rent is due to me, and before that rent is paid I will not allow these goods to be removed." This is no conversion. Many illustrations might be put to show how absurd would be the consequences of so holding. For instance, suppose a lodger was ill, and an attempt were made to remove the bed he was lying on. Some one interferes, and says to the man who wants to remove, and who is the true owner, "You shall not do so." This is an interference with his dominion over his own property; yet there would be no conversion. Indeed, it is only by relying upon the somewhat vague language which has been used about this form of action that any plausible argument can be maintained. Apart from mere *dicta*, no case, so far as I am aware, can be found where a man not in possession of the property has been held liable in trover unless he has absolutely denied the plaintiff's right, although, if in possession of the property, any dealing with it, inconsistent with the true owner's right, would be a conversion. A limited interference with the plaintiff's property, where all along the plaintiff is himself in possession, does not constitute conversion. * * *

I think, therefore, that the plaintiff must fail in this form of action. He may have another remedy by some form of action of trespass on the case, but the measure of damages would be different. It would be unjust that, under the circumstances proved, he should recover against the defendant the value of the goods. The rule must, therefore, be discharged.

Rule discharged.

BAIRD v. HOWARD.

(51 Ohio St. 57; 36 N. E. 732.—1894.)

BRADBURY, J. * * * The petition avers that the defendant, with intent to cheat and defraud the plaintiff, induced the latter to enter into the contract under consideration, and to deliver to the defend-

Even if the owner of goods voluntarily delivers them to another, the latter is guilty of a wrongful taking if he obtains them by such fraud as justifies the owner in avoiding the sale.

ant the property involved in the controversy, with knowledge that the plaintiff was "unfit and unable to make or enter into a valid contract," because his senses were dulled by intoxication. The demurrer admitted this to be true. It thus appeared, not merely that a contract had been made, but that the defendant had secured the possession of the plaintiff's property by knowingly taking advantage of the latter's temporary incapacity. Had possession been taken while the plaintiff's senses were overcome by sleep, no one would deny that such a possession was wrongful. The difference between the character of a possession secured by the latter method, and one deliberately obtained through the medium of an invalid contract made with one whose senses the possessor knew at the time were stupefied by excessive intoxication, is one of degree, rather than principle. That in the former case the transaction would involve a trespass, and present none of the features peculiar to contracts, while in the latter case it took the form of a contract, is a distinction possessing little if any materiality in this connection. The fraud inhering in the one should be deemed a substantial equivalent to the force involved in the other method of obtaining possession. Each is wrongful. To secure the possession of property by means of a contract made with its owner by one who, at the time, knew him to be incapable of entering into a contract, constitutes a fraud. In such case, it is true, a contract exists, which the incapacitated party has an option to affirm or rescind. But, because the one party may exercise this option, it does not follow that the other party may compel its exercise as a condition precedent to obtaining any relief. * * * *

We have found no case in all respects similar to the one under consideration, but, in a number of well-considered cases, courts have held that, where the purchase of goods has been effected by false representations, the vendor may maintain trover against the vendee without demand. Thurston v. Blanchard, 22 Pick. 18; Green v. Russell, 5 Hill, 183; Thompson v. Rose, 16 Conn. 71; Noble v. Adams, 7 Taunt. 59; Earl of Bristol v. Wilsmore, 2 Dowl. & R. 755.[1] In the procedure prescribed by our Civil Code, all the ancient common-law actions are abolished; all are merged into one "civil action." And, even if the facts stated in the petition did not disclose a technical conversion, they constitute fraud, to the injury of the plaintiff, as we have seen. The remedy should be as broad

[1] *Accord*, Holland v. Bishop 60 Min, 23, 61 N. W. 681 (1895).

as the injury. The party guilty of the fraud should not be allowed to shield himself by a contract procured in this way, and insist upon immunity for the fraud until the contract has been formally rescinded.

McPARTLAND v. READ.

(11 Allen, 231.—1865.)

Tort, to recover for the conversion of certain articles of household furniture. At the trial in the Superior Court, before PUTNAM, J., it appeared that, on the ninth of December, 1863, Samuel B. Cook executed and delivered a mortgage of the articles in controversy to the plaintiff, and to avoid the necessity of recording the mortgage it was proposed by Crook to put the furniture in one room of the house in which he lived, and lock the door, and deliver the key to William D. Whiting, who owned the house, that he might keep possession of the mortgaged property till Cook should pay to the plaintiff the debt secured by the mortgage. This being assented to, was accordingly done; and Cook shortly afterwards moved from the house, and the key of the house was also delivered to Whiting. After this had been done, and before the mortgage had been recorded, the furniture was attached by the defendant Read, who was a deputy sheriff, on a writ against Cook, and was subsequently sold by him on the execution which was obtained in the suit. The other defendant, Foque, acted as the agent of the attaching creditor in directing and assisting in the attachment.

BIGELOW, Ch. J. These exceptions are groundless. 1. The evidence of delivery of the chattels included in the mortgage, and of the retention of possession of them by the mortgage, was plenary. Delivery to and possession by the agent are the same in legal effect as if made to and held by the principal. The agency was clearly proved.

2. So was the evidence of the conversion of the property. Every tortious taking, with intent to apply chattels to the use of the taker or some other person than the owner, is a conversion.

3. Both defendants were liable. It is not necessary in order to charge them to show that each actually participated in seizing and removing the property. It was sufficient to prove that both were

present, one inciting or directing the wrongful taking, and the other obeying the order and carrying it into effect. Both were principals in the conversion.

Exceptions overruled.

MULGRAVE v. OGDEN.

(Croke, Elizabeth, 219.—1591.)

Action sur trover of twenty barrels of butter; and counts that he *tam negligenter custodivit* that they became of little value. Upon this it was demurred, and held by all the justices, that no action upon the case lieth in this case; for no law compelleth him that finds a thing to keep it safely; as if a man finds a garment, and suffers it to be moth-eaten; or if one find a horse and giveth it no sustenance; but if a man find a thing and useth it, he is answerable, for it is conversion; so if he of purpose misuseth it, as if one finds paper and puts it into the water, etc.; but for negligent keeping no law punisheth him.[1]

[1] In Marshall etc. Co. v. Kansas etc. Ry., 176 Mo. 480, 75 S. W. 638, 98 Am. St. R. 508 (1903) the court declared: "There can be no question but that the shipper of goods has the right to designate the consignee, or, in other words, the person to whom they are to be delivered, and that the carrier is bound to obey the direction of the shipper, or to comply with the terms of his contract of shipment in this respect, and, if he disobeys them, he is liable as for a conversion. Wiggins Ferry Co. v. C. & A. Ry. Co., 128 Mo. 224, 27 S. W. 568, 30 S. W. 430; Jeffersonville R. Co. v. White, 6 Bush, 251. A misdelivery by a carrier of an article intrusted to him to be carried is a conversion. Claflin v. Boston & Lowell Railroad Company, 7 Allen, 341; Bishop on Noncontract Law, § 405. Nor does the fact, that the railroad company offered to return the corn after it had been redelivered back again into the cars, furnish any justification for the conversion, though it might be considered in mitigation of damages. Sparks v. Purdy, 11 Mo. 219."

In Wamsley v. Atlas S. S. Co. 168 N. Y. 533, 61 N. E. 896, 85 Am. St. R. 699, (1901), it is said: "The general rule is that a common carrier is not liable in conversion for mere nonfeasance, although he may be liable for negligence. So, on the contrary, he may be held in trover when he is guilty of misfeasance, although the wrong may have been unintentional."

PEASE v. SMITH.

(61 N. Y. 477.—1875.)

The action was brought for the alleged conversion by the defendants of a quantity of law books belonging to the plaintiffs.

Plaintiffs were booksellers and stationers in the city of Albany. The defendants dealt largely in materials used in the manufacture of paper. Their course of business was to purchase from junk-shops and small dealers rags, old paper, etc., in bales, and to sell to the manufacturers. They bought, among others, from Moses K. Perry, a junk dealer in Albany. The evidence upon the trial tended to show that among the materials purchased from Perry were law blanks belonging to the plaintiffs, which had been stolen from them by one Frank Mason who was porter in their employ.

DWIGHT, C. There are several objections raised by the defendants on this appeal.

1. It is claimed that the judge erred at the trial in refusing to grant a nonsuit, because the defendants bought the goods in controversy in the course of trade, and had sold them before any claim was made by the owners. It is insisted by the appellant that it is a prerequisite to a valid claim for conversion, in such a case, that a demand should have been made for the goods while they were in the defendants' possession and before their sale, and that there can be no conversion, unless control over the property was exercised with knowledge of the plaintiff's rights. This proposition is untenable. The assumed sale by the porter of the plaintiff to Perry was wholly nugatory, and conveyed no title. Saltus v. Everett, 20 Wend. 267; McGoldrick v. Willets, 52 N. Y. 612. On like grounds, the sale by Perry to the defendants was without effect. They were constructively in possession of the plaintiff's property without the consent of the latter. They even sent their own carts to transfer the goods when sold to Allen Brothers. This exercise of an act of ownership or dominion over the plaintiff's property, assuming to sell and dispose of it as their own, was, within reason and the authorities, an act of conversion to their own use. The assumed act of ownership was inconsistent with the dominion of the plaintiffs, and this is of the essence of a conversion. Knowledge and intent on the part of the defendants are not material. So long as the defend-

ants had exercised no act of ownership over the property, and had acted in good faith, a demand and refusal would be necessary to put them in the wrong and to constitute conversion. Until such demand, there is no apparent inconsistency between their possession and the plaintiff's ownership. After a sale has been made by the defendants, they have assumed to be the owners, and will be estopped to deny in an action by the lawful owner, the natural consequences of their act, and to resist an action for the value of the goods. The principle is well stated by ALDERSON, B., in Fouldes v. Willoughby, 8 M. & W. 540: "Any asportation of a chattel for the use of the defendant or a third person amounts to a conversion for this simple reason, that it is an act inconsistent with the general right of dominion which the owner of a chattel has in it, who is entitled to the use of it at all times and in all places." In the same spirit, "conversion" is defined, in a very recent case, to be an unauthorized act which deprives another of his property permanently or for an indefinite time. Hiort v. Bott, L. R. (9 Ex.) 86 (A.D. 1874.) So it is said in Boyce v. Brockway, 31 N. Y. 490, that a wrongful intent is not an essential element in a conversion. It is enough that the rightful owner has been deprived of his property by some unauthorized act of another assuming dominion or control over it. No manual taking, on the defendants' part, is necessary. Bristol v. Burt, 7 J. R. 254; Connah v. Hall, 23 Wend. 462. The case of Harris v. Saunders, 2 Strobh. Eq. 370, resembles closely the case at bar. The defendant having the property of the plaintiff in his own hands by purchase from one who had no title, sold it to another who carried it beyond the plaintiff's reach, and received the purchase money. These acts were held to amount to a conversion, though the defendant was not aware of the plaintiff's title. As, according to these views, the conversion took place at the moment of the unauthorized sale[1] by the present defendants, no demand was necessary, the sole object of a demand being to turn an otherwise

[1] In most jurisdictions, it is held that the conversion, in such a case as this, takes place when the purchaser assumes ownership of the property. See Galvin v. Bacon, 11 Me. 28 (1833); Cooper v. Willomatt, 1 C. B. 672, 14 L. C. J. P. 219, 50 E. C. L. R. 672 (1845); Scott v. Hodges, 62 Al. 337 (1878); Sims v. James, 62 Ga. 260 (1879). Gilmore v. Newton, 9 Allen (91 Mass.) 171. 85 Am. Dec. 749 (1864); Trudo v. Anderson, 10 Mich. 357 (1862); Hyde v. Noble, 13 N. H. 494, 38 Am. Dec. 508 (1843); Velzian v. Lewis, 15 Or. 539, 16 Pac. 631, 3 Am. St. R. 184 (1888); Carey v. Bright, 58 Pa. 70 (1868); Riford v. Montgomery, 7 Vt. 411 (1835).

lawful possession into an unlawful one, by reason of a refusal to comply with it, and thus to supply evidence of a conversion. Esmay v. Fanning, 9 Barb. 176; Vincent v. Conklin, 1 E. D. Smith, 203; Glassner v. Wheaton, 2 id. 352; Munger v. Hess, 28 Barb. 75. After a wrongful taking and carrying away of the property, the cause of action has become complete without further act on the plaintiff's part. Brewster v. Silliman, 38 N. Y. 423; Hanmer v. Wilsey, 17 Wend. 91; Otis v. Jones, 21 id. 394.

* * * * *

Judgment affirmed.

SWIM v. WILSON.

(90 Cal. 126.—1891.)

DE HAVEN, J. The plaintiff was the owner of 100 shares of stock of a mining corporation, issued to one H. B. Parsons, trustee, and properly indorsed by him. This stock was stolen from plaintiff by an employee in his office, and delivered for sale to the defendant, who was engaged in the business of buying and selling stocks on commission. At the time of placing the stock in defendant's possession, the thief represented himself as its owner, and the defendant relying upon this representation, in good faith, and without any notice that the stock was stolen, sold the same in the usual course of business, and subsequently, still without any notice that the person for whom he had acted in making the sale was not the true owner, paid over to him the net proceeds of such sale. Thereafter the plaintiff brought this action to recover the value of said stock, alleging that the defendant had converted the same to his own use, and, the facts as above stated appearing, the court in which the action was tried gave judgment against defendant for such value, and from this judgment, and an order refusing him a new trial, the defendant appeals. It is clear that the defendant's principal did not by stealing plaintiff's property acquire any legal right to sell it, and it is equally clear that the defendant, acting for him and as his agent, did not have any greater right, and his act was therefore wholly unauthorized, and in law was a conversion of plaintiff's property. "It is no defense to an action of trover that the defendant acted as

the agent of another. If the principal is a wrongdoer, the agent is a wrongdoer also. A person is guilty of a conversion who sells the property of another without authority from the owner, notwithstanding he acts under the authority of one claiming to be the owner, and is ignorant of such person's want of title." Kimball v. Billings, 55 Me. 147; Coles v. Clark, 3 Cush. 399; Koch v. Branch, 44 Mo. 542. In Stephens v. Elwall, 4 Maule & S. 259, this principle was applied where an innocent clerk received goods from an agent of his employer, and forwarded them to such employer abroad; and, in rendering his decision on the case presented, Lord ELLENBOROUGH uses this language: "The only question is whether this is a conversion in the clerk, which undoubtedly was so in the master. The clerk acted under an unavoidable ignorance and for his master's benefit, when he sent the goods to his master; but, nevertheless, his acts may amount to a conversion; for a person is guilty of conversion who intermeddles with my property, and disposes of it, and it is no answer that he acted under the authority of another, who had himself no authority to dispose of it." To hold the defendant liable, under the circumstances disclosed here, may seem upon first impression to be a hardship upon him. But it is a matter of everyday experience that one cannot always be perfectly secure from loss in his dealings with others, and the defendant here is only in the position of a person who has trusted to the honesty of another, and has been deceived. He undertook to act as agent for one who it now appears was a thief, and, relying on his representations, he aided his principal to convert the plaintiff's property into money, and it is no greater hardship to require him to pay to the plaintiff the value of this property than it would be to take it away from the innocent vendee who purchased and paid for it. And yet it is universally held that the purchaser of stolen chattels, no matter how innocent or free from negligence in the matter, acquires no title to such property as against the owner, and this rule has been applied in this court to the innocent purchaser of shares of stock. Barstow v. Mining Co., 64 Cal. 388; Sherwood v. Mining Co., 50 Cal. 413.

The precise question involved here arose in the case of Bercich v. Marye, 9 Nev. 312. In that case, as here, the defendant was a stockholder who had made a sale of stolen certificates of stock for a stranger, and paid him the proceeds. He was held liable, the court in the course of its opinion saying: "It is next objected that, as the defendant was the innocent agent of the person for whom he

received the shares of stock, without knowledge of the felony, no judgment should have been rendered against him. It is well settled that agency is no defense to an action of trover, to which the present action is analogous." The same conclusion was reached in Kimball v. Billings, 55 Me. 147, the property sold in that case by the agent being stolen government bonds, payable to bearer. The court there said: "Nor is it any defense that the property sold was government bonds payable to bearer. The *bona fide* purchaser of a stolen bond payable to bearer might perhaps defend his title against even the true owner. But there is no rule of law that secures immunity to the agent of the thief in such cases, nor to the agent of one not a *bona fide* holder. * * * The rule of law protecting *bona fide* purchasers of lost or stolen notes and bonds payable to bearer has never been extended to persons not *bona fide* purchasers, nor to their agents." Indeed, we discover no difference in principle between the case at bar and that of Rogers v. Huie, 1 Cal. 571, in which case, BENNETT, J., speaking for the court, said: "An auctioneer who receives and sells stolen property is liable for the conversion to the same extent as any other merchant or individual. This is so both upon principle and authority. Upon principle, there is no reason why he should be exempted from liability. The person to whom he sells, and who has paid the amount of the purchase money, would be compelled to deliver the property to the true owner or pay him its full value; and there is no more hardship in requiring the auctioneer to account for the value of the goods than there would be in compelling the right owner to lose them, or the purchaser from the auctioneer to pay for them." It is true that this same case afterwards came before the court, and it was held, in an opinion reported in 2 Cal. 571, that an auctioneer, who in the regular course of his business receives and sells stolen goods, and pays over the proceeds to the felon, without notice that the goods were stolen, is not liable to the true owner as for a conversion. This latter decision, however, cannot be sustained on principle, is opposed to the great weight of authority, and has been practically overruled in the later case of Cerkel v. Waterman, 63 Cal. 34. In that case the defendants, who were commission merchants, sold a quantity of wheat, supposing it to be the property of one Williams, and paid over to him the proceeds of the sale before they knew of the claim of the plaintiff in that action. There was no fraud or bad faith, but the court held the defendants there liable for the conver-

sion of the wheat. In this case it was the duty of the defendant to know for whom he acted, and, unless he was willing to take the chances of loss, to have satisfied himself that his principal was able to save him harmless if in the matter of his agency he incurred a liability by the conversion of property not belonging to such principal.

Judgment and order affirmed.

SMITH v. DURHAM.

(127 N. C. 417: 37 S. E. 473.—1900.)

FAIRCLOTH, C. J. This is a civil action in the nature of trover for the conversion of a certain promissory note, payable to the plaintiff, in the sum of $2,400, signed by W. D. Rice. The plaintiff was president of the Bessemer City Cotton-Mill Company, and for a debt due by his company to Lyon, Conklin & Co., of Baltimore, Md., he deposited said note as collateral security; and the depositee sent the note to the defendant, as its attorney, for collection. By agreement with defendant, the plaintiff, for his company, confessed judgment for the amount due Lyon, Conklin & Co. Thereafter said judgment was paid in full by the Bessemer Company, and the debt for which said note was deposited as collateral security was thereby extinguished. After said judgment had been paid as aforesaid, the plaintiff demanded of the defendant, Durham, the surrender of said note, and he failed and refused to surrender it. At the time of said demand the maker of the note agreed with plaintiff to pay 25 cents on the dollar, and was able and willing to do so, and would have done so but for the defendant's refusal to surrender said note to the plaintiff, who alleges that he was damaged in the sum of $600 and interest, and demands judgment accordingly. The defendant, by his demurrer, admits the truth of the allegations in the complaint, and avers that the complaint does not set forth facts to constitute a cause of action in favor of the plaintiff and against the defendant.

It is admitted that the plaintiff is the owner of the note, and that it was in the possession of the defendant when last heard of. Presumably, it is still in his possession. Trover may be brought by the

owner for the recovery of damages for the conversion of every species of personal property which has value. 26 Am. & Eng. Enc. Law, 765. It may be maintained upon the refusal to deliver a letter. Teal v. Felton, 12 How. 284, 13 L. Ed. 990. Trover will lie for a bond or note. Brickhouse v. Brickhouse, 33 N. C. 404. "The injury lies in the conversion, for any man may take the goods of another into possession if he finds them, but no finder is allowed to acquire a property therein unless the owner be forever unknown; and therefore he must not convert them to his own use, which the law presumes him to do if he refuses them to the owner, for which reason such refusal alone is *prima facie* sufficient evidence of a conversion." 3 Bl. Comm. 152; Abrahams v. Bank, 7 Am. Rep. 33. There is quite a list of decisions which hold that conversion is an act of ownership exercised over the personal chattels of another, inconsistent with the owner's right. It must be an act. Mere words will not do. If a bailee publicly sells his bailor's goods, and becomes the purchaser, and holds them in defiance of his bailor, in such case no demand is necessary. University of North Carolina v. State Nat. Bank, 96 N. C. 280, 3 S. E. 359; Carraway v. Burbank, 12 N. C. 306; Glover v. Riddick, 33 N. C. 582. One in possession of another's property is bound to surrender it upon demand. Dowd v. Wadsworth, 13 N. C. 130. Lord HOLT, in an early case, said: "The very denial of goods to him that hath the right to demand them is an actual conversion, not only evidence of it." Baldwin v. Cole, 6 Mod. 212. We see from this course of reasoning that one in lawful possession of another's property after demand and refusal is in no better position than if his original possession had been wrongful. The defendant assigns no reason or explanation why he detains the note in question. As the case is now constituted, we see no reason why the demurrer was not overruled.

Error.[1]

[1] In Britton v. Ferrin 171 N. Y. 235, 63 N. E. 954 (1902), it is said: "Where one intrusts his property to another for a particular purpose, it is received in a fiduciary capacity, and when turned into money that is also received in the same capacity. It does not belong to the agent, and he can lawfully exercise no power or authority over it except for the benefit of his principal, and only as authorized by him. If the agent uses it for his own purposes, or fails to pay it over upon a seasonable demand, it is a conversion of that which does not belong to him. Baker v. New York National Ex. Bank, 100 N. Y. 31;

FROME v. DENNIS.

(45 N. J. L. 515.—1883.)

DIXON, J. In August, 1879, the plaintiff left his plow on the farm of one Cummins, with the latter's consent, until he, the plaintiff, should come and take it away. In April, 1880, the farm passed into the possession of one Hibler, the plow still being there. In June, 1880, the defendant, a neighboring farmer, borrowed the plow of Hibler to plow a field, supposing the plow to be Hibler's, and having used it, in three or four days returned it to Hibler, still supposing it to be his property. In the summer of 1881 the plaintiff informed the defendant that it was his plow which he had used, and demanded of him pay for the use, and the return of the plow or its value, and the defendant, not complying, the plaintiff brought an action of trover for the plow. The justice before whom the suit was instituted, and the Common Pleas on appeal, each gave judgment for the plaintiff for the value of the plow. The judgment of the Pleas is now before us on *certiorari*, and the defendant below contends that the foregoing facts proved on the trial did not justify the judgment.

In this contention we agree with the defendant.

In order to maintain an action of trover, it is necessary to prove a conversion by the defendant of the plaintiff's property. What will constitute a conversion is, I think, well summed up by Mr. Justice DEPUE in Woodside v. Adams, 11 Vroom, 417, in these words: "To constitute a conversion of goods, there must be some

Com. Nat. Bank of Penn. v. Heilbronner, 103 N. Y. 439, 444; Middleton v. Twombly, 125 N. Y. 520; Moffatt v. Fulton, 132 N. Y. 507, 515."

In Leadbetter v. Thomas 130 Al. 299, 30 So. 342 (1901). Tyson, J. said: "There is no dispute that that the mule was hired to plow a certain piece of land, and that it was so used in a careful manner. The controverted fact is, what was the contract as to the way or manner it was to be used? The plaintiff testified that it was agreed that the mule was to be worked, in conjunction with its mate, to a two-horse Oliver chilled plow. The defendant swears that no such agreement was made; that the kind of plow was not mentioned. The contract of bailment being in parol, it is a question for the jury to ascertain what was its term in this respect. If they find the disputed fact according to plaintiff's contention, the working of the mule to a three-horse riding plow was a conversion for which the defendant was liable in this action for conversion. Cartlidge v. Sloan, 126 Ala. 596, 29 South, 918 (1899), and authorities therein cited."

The reception of property by delivery from one whom the receiver is justly entitled to regard as its owner, & its return to him, or delivery over to a third person upon his

repudiation by the defendant of the owner's right, or some exercise of dominion over them by him inconsistent with such right, or some act done which has the effect of destroying or changing the quality of the chattel."

This subject has quite recently received considerable discussion in the Exchequer Chamber and House of Lords of England, in Fowler v. Hollins, L. R. 7 Q. B. 616, and L. R. 7 H. L. 757. The facts upon which the court finally settled as the basis of decision, made the case a plain one of conversion. They were, that one Bayley had fraudulently come into possession of thirteen bales of cotton belonging to plaintiff, and had sold and delivered them to the defendant, who bought in good faith, and who then sold and delivered them in good faith to Micholls & Co. Here was clearly an exercise of dominion over the goods by the defendant inconsistent with the plaintiff's right. But in the course of the cause some of the judges thought that, according to the case reserved, the defendant, in the transfer from Bayley to Micholls & Co., dealt only as broker and agent of the latter, and in examining the goods, receiving them from Bayley and forwarding them to Micholls & Co., acted without any actual intention with regard to, or any consideration of, the property in the goods being in one person more than another; and so the question was raised, whether such a possession of the goods and such an asportation amounted, in law, to a conversion. Many of the English cases were commented on at length by Mr. Justice BRETT, in both tribunals, and he insisted, with great force and clearness, upon a negative response. BYLES, J., and KELLEY, C. B., expressly concurred in this opinion, and the other judges in the Exchequer Chamber seem not to have disagreed with it in point of law, but they rested their conclusion upon a different view of the facts. In the House of Lords, Mr. Justice BLACKBURN expressed his opinion that the defendant was liable, because he both entered into a contract with Bayley, and also assisted in changing the custody of the goods, and so knowingly and intentionally assisted in transferring the dominion and property in the goods to Micholls & Co., that they might dispose of them as their own. This he deemed a conversion by the defendant, no matter whether he acted as broker or not. In the course of his remarks he lays down the principle that one who deals with goods at the request of the person who has the actual custody of them, in the *bona fide* belief that the custodier is the true owner, or has the authority of the true

order, without notice of an adverse claim in another, & without reference to the question of ownership of the property, are not

owner, should be excused from what he does, if the act is of such a nature as would be excused if done by the authority of the person in possession, if he was a finder of the goods or entrusted with their custody. He concedes, moreover, that this is not the extreme limit of the excuse, and doubts whether it would be a conversion for a miller to grind grain into flour and return the flour to the person who brought the grain, before he heard of the owner. Under the definition of Mr. Justice DEPUE, above quoted, this act of the miller would be a conversion, because it changed the quality of the owner's goods. Mr. Baron CLEASBY, while concurring with those who looked upon the defendant as a principal, and therefore guilty, says with reference to this view, that he was a broker merely: "How far the intermeddling with the goods themselves by delivering them would" involve a broker in responsibility to the owner, "admits of question, and was the subject of much argument at the bar, and might depend upon the extent to which the broker in such case could be regarded as having an independent possession of the goods and delivering them for the purpose of passing the property." Mr. Justice GROVE advised the house in favor of the plaintiff, on the ground that the defendant intermeddled with goods which were not his own, and exercised a dominion over them inconsistent with the right of the true owner. Mr. Baron AMPHLETT concurred with BRETT; Lord CHELMSFORD, Chancellor CAIRNS, Lords HATHERLEY and O'HAGAN advised for the plaintiff in substance, because the defendant had exercised dominion over the plaintiff's property by disposing of it to Micholls & Co.

It is apparent, I think, from a perusal of these judgments, that every judge based his opinion of the defendant's guilt on the question whether he had done any act which amounted to a repudiation of the plaintiff's title, or to an exercise of dominion, *i.e.* ownership over the goods. Less than this would constitute a trespass, but not a conversion, so long as the character of the chattels remained unchanged.

In the very late case in Massachusetts (Spooner v. Manchester, 133 Mass. 270) a similar view is expressed. FIELD, J., there says: "Conversion is based upon the idea of an assumption of property or a right of dominion over the thing converted, * * * and it is, therefore, not every wrongful intermeddling with, or wrongful asportation, or wrongful detention of personal property, that amounts to a conversion. Acts which themselves imply an assertion of title

or of a right of dominion over personal property, such as a sale, letting or destruction of it, amount to a conversion, even although the defendant may have honestly mistaken his rights; but acts which do not, in themselves, imply an assertion of title or of a right of dominion over such property, will not sustain an action of trover, unless done with the intention to deprive the owner of it permanently or temporarily, or unless there has been a demand for the property and a neglect or refusal to deliver it, which are evidence of a conversion, because they are evidence that the defendant, in withholding it, claims the right to withhold it, which is a claim of a right of dominion over it. * * * Whether an act involving the temporary use, control or detention of property, implies an assertion of a right of dominion over it, may well depend upon the circumstances of the case and the intention of the person dealing with the property."

To the same effect is Laverty v. Snethen, 68 N. Y. 522. In the light of these authorities, the conduct of the defendant in the case at bar did not amount to a conversion of the plow. He received it for a temporary use only, and without any claim of right or dominion over it, but having a mere license from the possessor, revocable at once by either the possessor or the true owner. He surrendered it to the possessor from whom he had received it, without any intention of enlarging or changing his title, without any reference to anybody's title, and doubtless would have as readily surrendered it to the plaintiff upon his ownership being shown. Neither in the use nor in the surrender by the defendant does there appear any repudiation of the owner's right, or any exercise of dominion inconsistent with such right. His acts may have constituted a trespass, but not a conversion.

This being so, his subsequent failure to deliver the plow to the plaintiff on demand, was not evidence of a conversion, for the reason that delivery was then impossible to him. He did not refuse to deliver, but could not. Ross v. Johnson, 5 Burr. 2825; Salt Springs Bank v. Wheeler, 48 N. Y. 492; Magnin v. Dinsmore, 70 N. Y. 410.

The plaintiff contends that the evidence on the part of the defendant as to his conversation with Hibler, at the time of borrowing the plow was illegal. It was not, however. It being proper to show that the defendant came into possession of the plow, the declarations of himself and of the person from whom he received possession, contemporaneous with the transfer and indicative of its

Where a servant receives property from his master, honestly believing that it

character, were admissible as part of the *res gestæ*. Luse v. Jones, 10 Vroom, 707; Hunter v. State, 11 Vroom, 495.

The judgment below should be reversed.[1]

GURLEY v. ARMSTEAD.

(148 Mass. 267.—1889.)

Tort, for the conversion of certain articles of personal property belonging to the plaintiff. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, on an agreed statement of facts, which, so far as material, appears in the opinion.

DEVENS, J. The defendant, who was a jobbing teamster, removed the goods alleged to have been by him converted from a room in the dwelling house of one Whittier to the store of one Davis, and there delivered them to Whittier, by whose direction he had acted. Although the goods were in the house of Whittier, they were in a room hired by the plaintiff from him. The contract between them was one for rent, and not for storage, Whittier reserving no control over the room. It was, however, neither locked nor fastened, although no goods were in it except those of the plaintiff. In all that he did the defendant acted in good faith, without any intention of depriving the rightful owner of her property, and in ignorance of the fact that the plaintiff was such owner, neither asserting title in himself nor denying title to any other, nor exercising any act of ownership except by the removal above stated.

The legal possession of the goods was, under these circumstances, undoubtedly in the plaintiff, and as they were in the room hired by her, the actual possession was also hers. The apparent control of them was, however, in Whittier, as they were in his house, and he had further the present capacity to take actual physical possession, as the room in which they were was neither locked nor fastened.

It is conceded that whoever receives goods from one in actual,

[1] Cf. Roach v. Turk, 9 Heisk. (Tenn.) 708, with Hollins v. Fowler, cited, *supra*.

belongs to the latter, and delivers it to another without notice that the master has no right to it, — the servant is not guilty of a tort.

although illegal, possession thereof, and restores the goods to such person, is not liable for a conversion by reason of having transported them. Strickland v. Barrett, 20 Pick. 415; Leonard v. Tidd, 3 Met. 6. And this would be so apparently, even if the goods thus received were restored to the wrongful possessor, after notice of the claim of the true owner. Loring v. Mulcahy, 3 Allen, 575; Metcalf v. McLaughlin, 122 Mass. 84.

Upon the precise question raised, we have found no direct authority, nor was any cited in the argument; but the principle upon which the decisions above cited rest is not unreasonably extended when it is applied to the circumstances of the case at bar. The act of removing the goods by direction of the wrongful possessor of them is an act in derogation of the title of the rightful owner; but the party doing this honestly is protected, because from such actual possession he is justified in believing the possessor to be the true owner. He does no [redacted] such possessor might himself have done by virtue of his w[redacted]ful possession.

The defendant was a job teamster, and thus in a small way a common carrier of such wares and merchandise as could appropriately be transported in his team or wagon. He exercised an employment of such a character that he could not legally refuse to transport property such as he usually carried, which was tendered to him at a suitable time and place with the offer of a reasonable compensation. If he holds himself out as a common carrier, he must exercise his calling upon proper request and under proper circumstances. Buckland v. Adams Express Co., 97 Mass. 124; Judson v. Western Railroad, 6 Allen, 486. His means of ascertaining the true title of the freight confided to him are of necessity limited. He must judge of this as it is fairly made to appear. If Whittier had actually gone into the room, as he might readily have done, and taken physical possession of the goods, the defendant upon well-established authority would have been justified in obeying the order, and transporting the goods to Whittier at another place; and he should not be the less justified where Whittier, in apparent control of the goods in his own house, and capable of immediately taking them into his actual custody by entering the room through the unlocked door, has directed the removal.

If a person standing near in sight of a bale of goods lying on the sidewalk belonging to another, and thus in the legal possession of such other, is able at once to possess himself of it actually, although

illegally, and directs a carrier to remove it and deliver it to him at another place, compliance with this order in good faith cannot be treated as a conversion; and apparent control, accompanied with the then present capacity of investing himself with actual physical possession, must be equivalent to illegal possession in protecting a carrier who obeys the order of one having such control.

Judgment for the defendant.

WILSON v. McLAUGHLIN.

(107 Mass. 587.—1871.)

AMES, J. 1. It appears that, when the horse was taken up, he was going at large in the highway, and was s[redacted]to be about to enter upon the premises of the defendant's em[redacted]. Under such circumstances, the act of turning him into an enclosed pasture was not an interference with the owner's possession, or a conversion of the horse to the defendant's own use. Nothing is shown at all inconsistent with a purpose on the defendant's part to keep the horse for the owner; and it has been decided that the finder of an estray may keep it for the owner, and is not liable in trover unless he uses the estray, or refuses to deliver it on demand. Nelson v. Merriam, 4 Pick. 249. We do not understand the plaintiff to complain of this act, except on the ground that the defendant afterwards violated his trust as a voluntary bailee by turning the horse into the highway again. But this, it appears to us, was the act of his employer, and not of himself. He could not keep the horse on another man's land, against the will of such other man. The turning out into the highway was therefore an act which he could not prevent, and for which he cannot be held responsible; and the plaintiff has no cause of action under this first count. * * * *

Exceptions overruled.[1]

[1] Compare Sovern v. Yoran, 16 Or. 269, 20 Pac. 100, 8 Am. St. R. 293 (1888); Smith v. Nashua & L. Ry., 27 N. H. 86, 90, 50 Am. Dec. 384 (1853), with Dougherty v. Posegate, 3 Ia. 88 (1856). In this case defendant's legal advisers had told him to put the money, which he had found, back where he found it. The court does not intimate that this was unsound advice, and the liability of the defendant, the jury were instructed, depended upon whether he had been guilty of gross negligence. See analogous cases, Roulston v.

MERZ v. CHICAGO & N. W. RY. CO.

(86 Minn. 33: 90 N. W. 7.—1902.)

COLLINS, J. Action for the conversion of cattle delivered to defendant railway company at Rolf, in the state of Iowa, by plaintiff, as consignor, for shipment over its own and connecting lines of road to Monticello, in this state, to himself as consignee.

1. The fact that the property in dispute was taken from the possession of defendant carrier by one having title, paramount to that of this plaintiff is a good defense in an action brought by the latter for a conversion thereof. This is well settled in this jurisdiction, National Bank of Commerce v. Chicago, B. & N. R. Co., 44 Minn. 224, 46 N. W. 342, 560, 9 L. R. A. 263, 20 Am. St. Rep. 566, as it is elsewhere. It has also been held by this court that where a common carrier, on demand of the true owner having right of possession, has delivered to him the property bailed, it is a complete justification for non-delivery. In this respect there is no difference between a common carrier and any other bailee. Thomas v. Express Co., 73 Minn. 185, 75 N. W. 1120.

2. It would seem to follow, logically, that where property is in the hands of a common carrier, and possession under a claim of ownership is demanded by a stranger to the bill of lading prior to actual shipment, as was the fact here, the carrier, having reasonable doubt as to which party is entitled to possession and acting in good faith, may have a reasonable time in which to investigate the claims of the respective parties, and for this purpose may delay immediate shipment. If there is a reasonable doubt as to the party entitled to possession, a refusal to ship the property until a reasonable opportunity is had to ascertain the validity of the asserted claim or right is not sufficient evidence of conversion. In such a case the law does not require the carrier to act on the instant, and either comply with or delay the demand, at his peril. Hett v. Railway Co., 69 N. H. 139, 44 Atl. 910. This doctrine is laid down, with a citation of cases, in Hutch. Carr. §§ 344, 408, and in Ray, Neg. Imp. Duties, § 143.

McClelland, 2 E. D. Smith (N. Y.) 60 (1853); Griswold v. Boston & M. Ry., 183 Mass. 434, 67 N. E. 354 (1903); Doxtator v. Chic. & M. Ry. 120 Mich, 596, 79 N. W. 922 (1899); Dyche v. Vicksburg etc., Ry., 79 Miss. 361, 30 So. 711 (1901).

When demand is made upon a common carrier or other bailee for goods by another than the bailor, the bailee is entitled to a reasonable time for investigation; & during such period, his detention

See, also, an elaborate note to Kohn v. Railway Co., 37 S. C. 1, 34 Am. St. Rep. 734 (s. c. 16 S. E. 396, 24 L. R. A. 100) and also 2 Rap. & M. Ry. Dig. pp. 75, 125, 126; and 8 Rap. & M. Ry. Dig. pp. 111, 112, in which will be found general rules relating to actions for conversion brought against common carriers. The doctrine stated undoubtedly prevails when a demand, asserting ownership, is made upon an ordinary bailee, and no good reason can be suggested why it should not be applied to common carriers. What is a reasonable time for investigation is ordinarily a question for a jury, and depends upon the circumstances. It is obvious that less time should be taken where perishable property is involved than where the property cannot be specially injured by detention for a few hours; and the question of good faith on the part of the carrier is also one for the jury, ordinarily.

3. It is a sufficient defense in an action against a common carrier for conversion to prove that there has been a seizure of the property under legal process, but the burden of proof is upon such carrier to show that the process was regular and valid upon its face. A seizure under void process is no defense. It is also the duty of the carrier, in case of a seizure under process, to notify the shipper promptly of the pendency of the legal proceedings in order to enable him to make a proper defense. * * * *

Reversed, and new trial ordered.

CARR v. DODGE.

(40 N. H. 403.—1860.)

NESMITH, J. The first question presented for consideration in this case is, Can the plaintiff recover, in this form of action, that portion of the income of the farm for the year 1854 which remained as undivided common stock at the time of the decease of his testator, James Dodge, on the 10th of January, 1855, the commissioner estimating the value of this property at $154.08?

We suppose it to be well settled that the relation established by law between the owners of this property, at the time of the death of the father, was that of tenants in common. Upon this point the authorities appear to be decisive. * * * *

The relation of the parties being thus established by law to the income of the farm for the year 1854, the next question is, Can this form of action be maintained? The ordinary presumption of law is, that a sole possession by one tenant in common is held in the right of both tenants. Buckmaster v. Needham, 22 Vt. 617. "One tenant in common in possession is not liable in trover, by his co-tenant, for his portion of the crops grown upon the land." Kersel v. Earnest, 21 Penn. 58; Moores v. Bunker, 29 N. H. 420. In an action to recover damages for the conversion of a chattel, if the plaintiff be the several owner, he would be entitled to recover upon the proof of the demand and refusal; but if his interest be joint, and had never been separated, he could not recover against a co-owner, without proving also that the conversion went to the destruction of the chattel, or the entire exclusion of his right. Allen v. Harper, 26 Ala. 126; Kennison v. Hum, 29 N. H. 501. The plaintiff will recover, when the joint owner has taken the whole property from him by action of replevin. 3 Kern. 173. "One tenant in common cannot maintain trover against his co-tenant of the same chattel for any act less than the destruction of his interest therein." Hurd v. Darling, 14 Vt. 214. "But a sale of a chattel by a co-tenant shows a kind of dominion unjustifiable and inconsistent with the rights of the parties." Hill on Sales; Mumford v. McKay, 8 Wend. 444, 403; Weld v. Oliver, 21 Pick. 559; Wilson v. Reed, 3 Johns. 174; Blake v. Mulliken, 14 N. H. 213.

This case does not find such a conversion as the law contemplates should exist, in order to entitle the plaintiff to recover any portion of the crops or income of the farm for 1854, by the action of trover; and therefore the sum of $154.08, or the claim to this amount of crops, must be disallowed, and cannot be recovered in this action[1] * * * *

[1] Where the property is easily susceptible of exact division, refusal by a co-tenant to sever is a conversion. Stall v. Wilbur, 77 N. Y. 158; Gates v. Bowers, 169 N. Y. 14, 61 N. E. 993, 88 Am. St. R. 530 (1901); Pickering v. Moon 67 N. H. 533, 32 At. 828 (1894); Balch v. Jones, 61 Cal. 234. But this rule does not apply where one has a mere right to have a part of a larger mass set out to him, but no title. Morrison v. Dingley, 63 Me. 553.

The prevailing rule also permits the owner of converted property to abandon it to the converter, and recover its value as well as other damages.

HOFSCHULTE v. PANHANDLE HARDWARE CO.

(50 S. W. (Tex. Civ. App.) 608.—1899.)

STEPHENS, J. The appellee caused certain threshing machinery belonging to appellant, and situated in Wichita county, to be seized under attachment as the property of J. W. Skelton. A few days thereafter, and after they had removed the property to the town of Wichita Falls, a distance of about 15 miles, upon discovering that it did not belong to Skelton, they offered to return it to appellant, but he declined to receive it. This suit was consequently brought by him to recover the value of the machinery, together with its rental value, as the measure of his damages, alleging a conversion by the appellees. The defenses interposed were (1) the offer to return the property, and (2) an estoppel, upon the ground that appellant's conduct and declarations had been such as to induce them to believe that the property belonged to Skelton, and hence to make the levy. Both defenses were submitted to the jury; and, as the verdict went against appellant, he now assigns error to the charge submitting these issues.

We are of opinion that the evidence did not warrant the submission of the issue of estoppel, and that the error assigned to the charge upon this ground is fatal to the judgment. We are also of opinion that the law did not warrant the other defense, since no offer to restore the property after conversion will defeat the action or mitigate the damages. Such an offer, even when accepted, merely mitigates the damages, but does not defeat the action entirely. So the law is laid down in the standard works on damages. 1 Sedg. Meas. Dam. § 53; 1 Suth. Dam. p. 240; 3 Suth. Dam. p. 529. The proposition seems equally well sustained by judicial decisions both in and out of this state, as will be seen by an examination of the following cases: Weaver v. Ashcroft, 50 Tex. 427; Norman v. Rogers, 29 Ark. 365; Stickney v. Allen, 10 Gray, 352; Ewing v. Blount, 20 Ala. 694; Irish v. Cloyes, 8 Vt. 30; Livermore v. Northrup, 44 N. Y. 107; Bringard v. Stellwagen, 41 Mich. 54, 1 N. W. 909; Carpenter v. Dresser, 72 Me. 377. In the case last cited may be found a review of previous decisions, together with a statement of the reasons for the rule.

In support, however, of the opposite view, the appellees cite Bish.

Noncont. Law, § 401, but which seems to be more the expression of the individual opinion of the author than the result of judicial decision. The appellees also cite some cases from Wisconsin which favor their contention; but, even according to the rule prevailing in that state, the offer to return the property does not defeat the action, but only goes in certain cases in mitigation of damages. The Wisconsin rule, as appears from the opinion in the leading case of Churchill v. Welsh, 47 Wis. 39, 1 N. W. 398, seems to have been taken from the practise of the English courts, and has not been adopted, except to a very limited extent, in this country, and certainly not in Texas. The other cases cited are from the Illinois and Missouri courts of appeals, and are not accessible to us. It results that, in no view of the case was the court right in treating the offer to return the property as a complete defense to the action, excluding the claim for the use of the machinery, to say nothing of nominal damages.

The judgment must therefore be reversed, and the cause remanded for a new trial.

MILLER v. HYDE.

(161 Mass. 472.—1894.)

REPLEVIN of horse converted by Geo. Bryden, Nov. 13, 1890, and sold by him March 31, 1891, to J. C. Davenport and A. L. Hyde. In November, 1891, plaintiff brought trover in Connecticut for the horse against Bryden, Davenport, Hyde and John Shillinglaw, the horse then being in the possession of the last three defendants. Judgment was recovered against Bryden, but not against the other defendants, as they had nothing to do with the horse until some months after Bryden's conversion of it. The horse had been attached at the commencement of the suit, and execution on the judgment was levied on it, but it was replevined in Connecticut by Davenport, who intrusted it to E. A. Hyde by whom it was taken to Massachusetts, and against whom the present replevin suit was brought. The Connecticut replevin suit had not been determined when this was commenced; Bryden was worthless and the judgment against him by plaintiff remained wholly unsatisfied. The trial court ordered judgment for the defendant.

BARKER, J. The plaintiff may maintain replevin if she is the owner of the horse, and if she is not estopped from asserting her ownership against the defendant. As administratrix of her husband's estate, she was the owner when she brought trover in Connecticut against Bryden, the bailee who had wrongfully usurped dominion and sold and delivered the horse to Davenport. As the horse was in Connecticut and the action of trover was in the courts of that State, the effect of the suit upon her title would be determined by the law of the forum. But as the law of Connecticut is not stated as an agreed fact, we must apply our own. Whether a plaintiff's title to the chattel is transferred upon the entry in his favor of judgment in trover has not been decided by this court. Assuming that, in early times, title to the chattel was transferred to the defendant upon the entry of judgment for the plaintiff in trover, at present a different doctrine is generally applied, and it is now commonly held that title is not transferred by the entry of judgment, but remains in the plaintiff until he has received actual satisfaction. See Atwater v. Tupper, 45 Conn. 144; Turner v. Brock, 6 Heisk. 50; Lovejoy v. Murray, 3 Wall. 1; *Ex parte* Drake, 5 Ch. Div. 866; Brinsmead v. Harrison, L. R. 7 C. P. 547; 1 Greenl. Ev. § 533, and note. And the law has been commonly so administered by our own trial courts. We think this doctrine better calculated to do justice, and see no reason why we should not hold it to be law. Whenever the title passes, as there has been no sale or gift and no title by prescription or by possession taken upon abandonment by the true owner, the transfer is made by his inferred election to recognize as an absolute ownership the qualified dominion wrongfully assumed by the defendant. The true owner makes no release in terms and no election in terms to relinquish his title; but the election is inferred by the law, to prevent injustice. Formerly this election was inferred when judgment for the plaintiff was entered, because his damages, measured by the value of the chattel and interest, were then authoritatively assessed, and the judgment brought to his aid the power of the court to enforce its collection out of the wrongdoer's estate or by taking his person; and this was deemed enough to insure actual satisfaction. If so, it was just to infer that when he accepted these rights he elected to relinquish to the wrongdoer the full ownership of the chattel. An election was not inferred when the suit was commenced, although the plaintiff then alleged that the defendant had converted the chattel, and although the writ

might contain a capias; because, owing to the uncertainties attendant upon the pursuit of remedies by action, it was not just to infer such an election while ultimate satisfaction for the wrong was but problematical. Forms of action are a means of administering justice rather than an end in themselves. When it is seen that the practical result of a form of action is a failure of justice, the courts will make such changes as are necessary to do justice. If the entry of judgment in trover usually gave the judgment creditor but an empty right, it was not just to infer that upon acquiring such a right he relinquished the ownership of the chattel, and the rule that required the inference to be then drawn was properly changed. The ground for inferring such an election was that upon the entry of judgment he acquired an effectual right in lieu of his property, and the doctrine that, without some actual satisfaction, the inference of an election would not be drawn has been shown by experience to be necessary to the administration of justice, and has been generally acted upon, and the modern rule adopted that the plaintiff's title is not transferred by the entry of judgment, but is transferred by actual satisfaction. Trover is but a tentative attempt to obtain justice for a wrong, and, until pursued so far that it has given actual satisfaction, ought not to bar the plaintiff from asserting his title. The present doctrine is consistent with the general principle stated by Lord ELLENBOROUGH in Drake v. Mitchell, 3 East, 251, and quoted in Vanuxem v. Burr, 151 Mass. 386, 389, as approved in Lord v. Bigelow, 124 Mass. 185, that "a judgment recovered in any form of action is still but a security for the original cause of action until it be made productive in satisfaction to the party." Whether the holder of an unsatisfied judgment in trover can, without a fresh taking, maintain replevin against the same defendant, or is restricted to one action against the same person for a single tort, we do not now decide. See Bannett v. Hood, 1 Allen, 47; Trask v. Railroad Co., 2 Allen, 331; Bliss v. Railroad Co., 160 Mass. 447. If he is so restricted, it is not because the ownership of the chattel has been transferred. But the present plaintiff has done more than to take judgment in trover: In her action of trover she caused the horse to be attached as property of Bryden, and, since obtaining judgment, she has caused the horse to be seized in execution on the judgment as his property, and to be kept and offered for sale on the execution until, as it was about to be so sold, it was replevined by Davenport from the officer in a suit between them which is still pending in

Connecticut. That suit is not a bar to this action, because it is not between the same parties. White v. Dolliver, 113 Mass. 400; Newell v. Newton, 10 Pick. 470. But we must still inquire whether, assuming that the plaintiff's property in the horse was not transferred by her judgment in trover, it was transferred by that judgment taken in connection with the facts of the attachment and levy, and also whether she is estopped by the attachment and the levy from asserting her title in this action.

In the first place, the doctrine that a mortagee of personalty who attaches the mortgaged goods on a writ against the mortgagor cannot afterwards enforce his mortgage is not in point. The mortgagee is not the owner, but has merely a lien, and may well be held to relinquish that lien when by the attachment he establishes another. But if the plaintiff has actual ownership, and thus the full right to do with his own property as he may choose, merely procuring it to be attached on mesne process, or seized on execution as the property of another, does not work a change of ownership. The owner does not sell or give away his goods. In cases which are likely to occasion such conduct there usually is, as in the present case, a disputed title; and it is with the hope of avoiding litigation over it that the real owner consents that the chattel shall for a special purpose only be treated as the property of another. This is "consistent with an intention ultimately to assert title should circumstances render it desirable for him so to do;" and he may well wait to see an issue, which may be such as to avoid the litigation of the question of title. See Edmunds v. Hill, 133 Mass. 445, 446; Bursley v. Hamilton, 15 Pick. 40, 43; Johns v. Church, 12 Pick. 557; Mackay v. Holland, 4 Metc. 69, 74; Dewey v. Field, 4 Met. 381, 384. Nor is there any good reason why such a use of his own property by a plaintiff in trover should be held to divest him of his ownership when it would not have that effect in other forms of action. In trover he is in legal effect asserting by his suit that the title is and will remain in himself until he receives satisfaction on a judgment, and his subjection of the chattel to attachment or to seizure on execution is simply a use which he chooses to make of his own property, which does not divest him of title, or hamper him in the subsequent assertion of his ownership except by the rules of estoppel. The case of *Ex parte* Drake, above cited, is an authority to the point that a plaintiff who has brought an action of detinue, and taken judgment both for the detention and the value of the chattel,

and has also proved his judgment in bankruptcy after having had the chattel seized on execution as the defendant's property, may nevertheless assert his ownership and have process to restore to him the chattel in specie. In such cases courts look to substance rather than form, and do not by inferring an election or a waiver deprive of his property a plaintiff who has unfortunately resorted to some futile method of procuring redress. In the present case, Davenport had bought the horse of Bryden before the attachment was made, and therefore the attachment was a denial of his ownership as well as an assertion of her own title by the plaintiff. The natural construction to be put upon her conduct in attaching and beginning a levy upon her own horse as the property of Bryden in a suit asserting her ownership is that, while she contended that in fact the horse was her own, she consented that, if litigation with Davenport as to the true state of title could be avoided by so selling the horse that the proceeds of the sale should be applied upon her claim for damages she would in that event no longer assert her paramount title. Her implied offer not having been accepted, and Davenport having rendered impossible the accomplishment of her plan to avoid further litigation, she could thereupon say that all which had gone before was provisional upon the completion of the levy, and could enforce her right of property by any proper action against Davenport, or any one who might thereafter take wrongful possession of her horse, unless barred by the rules of estoppel. It appearing that neither Davenport nor defendant Hyde had changed his position or conduct in reliance on plaintiff's action in levying the attachment or execution, it was held there was no estoppel and judgment was ordered for the plaintiff.

HOLMES, J. As the judges are not unanimous, it becomes necessary for me to state my views, which otherwise I should not do, as they have not persuaded my brethren.

I am of opinion that the plaintiff ought to be barred in this action by her recovery of judgment in trover for the same horse. I am aware that the doctrine that title passes by judgment without satisfaction is not in fashion, but I never have been able to understand any other. It has always seemed to me that one whose property has been converted has an election between two courses,—that he may have the thing back, or he may have its value in damages, but that he cannot have both; that when he chooses one he necessarily gives

up the other; and that by taking a judgment for the value he does choose one conclusively. He cannot have a right to the value of the thing, effectual or ineffectual, and a right to the thing, at the same time. The defendant is estopped by the judgment to deny the plaintiff's right to the value of the thing. Usually, estoppels by judgment are mutual. It would seem to follow that the plaintiff also is estopped to deny his right to the value of the thing, and therefore is estopped to set up an inconsistent claim. In general, an election is determined by judgment. Butler v. Hildreth, 5 Metc. 49; Bailey v. Hervey, 135 Mass. 172, 174; Vulcanite Co. v. Caduc, 144 Mass. 85, 86; Raphael v. Reinstein, 154 Mass. 178, 179. I know of no reason why a judgment should be less conclusive in this case than any other. Of course, I am speaking of a judgment for the value of the chattel, not for one giving nominal damages for the taking. The argument from election is adopted in White v. Philbrick, 5 Greenl. 147, 150, which, so far as I know, is still the law of Maine, notwithstanding the remark in Murray v. Lovejoy, 2 Clif. 191, 198. See, also, SHAW, C. J., in Butler v. Hildreth, 5 Metc. 49, 53.

The most conspicuous cases which have taken a different view speak of the hardship of a man's losing his property without being paid for it, and sometimes cite the *dictum* in Jenk. 4th Cent., Case 88, *Solutio pretii emptionis loco habetur*, which is dogma, not reasoning, or, if reasoning, is based on the false analogy of a sale. But they leave the argument which I have stated unanswered, not, as I think, because the judges deemed it unworthy of answer, or met by paramount considerations of policy, but because they did not have either that, or a clue to the early cases, before their mind. Lovejoy v. Murray, 3 Wall. 1, 17; Brinsmead v. Harrison, L. R. 6 C. P. 584, 587, L. R. 7 C. P. 547, 554. It is not the practice of the English judges to overrule the common law because they disprove it, and to do so without discussion. In Brinsmead v. Harrison, Mr. Justice WILLES thought he was proving that the common law always had been in accord with his position. So far as the question of policy goes, it does not seem to me that the possibility —it is only the possibility—of an election turning out to have been unwise is a sufficient reason for breaking in upon a principle which must be admitted to be sound on the whole, and for overthrowing the doctrine of the common law by a judicial fiat. I am not in-

formed of any statistics which establish that judgments for money usually give the judgment creditor only empty right.

That the view which I hold is the view of the common law, I think, may be proved by considering what was the theory on which the remedies of trespass and replevin were given. In Y. B. 19 Hen. VI. 65, pl. 5, Newton says: "If you had taken my chattels, it is at my choice to sue replevin, which shows that the property is in me, or to sue a writ of trespass, which shows that the property is in the taker; and so it is at my will to waive the property or not." In 6 Hen. VII. 8, pl. 4, Vavisor uses similar language, and adds: "And so it is of goods taken. One may divest the property out of himself, if he will, by proceedings in trespass, or demand property by replevin or writ of detinue," if he prefers. There is no doubt that the old law was that replevin affirms property in the plaintiff, and trespass disaffirms it, and that the plaintiff has election. Bro. Abr. Trespass pl. 134; 18 Vin. Abr. 69 (E); ANDERSON and WARBERTON, JJ., in Bishop v. Montague, Cro. Eliz. 824. The proposition is made clearer when it is remembered that a tortious possession—at least, if not felonious—carried with it a title by wrong, in the case of chattels, as well as in the case of a disseisin of land, as appears from the page of Viner just cited, and as has been shown more fully by the learned researches of Mr. Ames and Mr. Maitland. 3 Harv. Law Rev. 23, 326; 1 L. Q. Rev. 324. I do not regard that as a necessary doctrine, or as the law of Massachusetts; but it was the common law, and it fixed the relations of trespass and replevin to each other. Trespass, and, on the same principle, trover, proceed on the footing of affirming property in the defendant, and of ratifying the act of the defendant which already has affirmed it. I do not see on what other ground a judgment for the value can be justified. If the title still is in doubt, or remains in the plaintiff, the defendant ought not to be charged for anything but the tortious taking. Again, cannot the plaintiff take the converted chattel on execution? And on what principle can he do so, if it does not yet belong to the defendant?

I say but a word as to the practical difficulties of the prevailing rule. No doubt they can be met in one way or another. Suppose the plaintiff, after judgment, were to retake the chattel by his own act. It would strike me as odd to say that this satisfied the judgment; and as impossible to say that it satisfied the whole judgment, which was for the tort, as well as for the value of the property.

Yet, on the view which I oppose, I presume that the judgment could not be collected. See Coombe v. Sansom, 1 Dowl. & R. 201.

It seems to me that the opinion which I hold was the prevailing one in England until Brinsmead v. Harrison. Bishop v. Montague, Cro. Eliz. 824; FENNER, J., in Brown v. Wootton, Cro. Jac. 73, 74, Yel. 67, Moore, 762; Adams v. Broughton, 2 Strange, 1078, Andrews, 18, 19; Buckland v. Johnson, 15 C. B. 145, 157, 162, 163; Sergeant James Manning's note to Barnett v. Branado, 6 Man. & G. 640; see Lamine v. Dorrell, 2 Ld. Raym, 1216, 1217. And I should add that I see a relic of the ancient and true doctrine in the otherwise unexplained notion that when execution is satisfied the title of the defendant relates back to the date of the conversion. Hepburn v. Sewell, 5 Har. & J. 211; Smith v. Smith, 51 N. H. 571 and 50 N. H. 212. Compare Atwater v. Tupper, 45 Conn. 144, 148.

The only authorities binding upon us are the ancient evidences of the common law, as it was before the Revolution, and our own decisions. I have shown what I think was the common law. Our own decisions leave the question open to be decided in accordance with it. Campbell v. Phelps, 1 Pick. 62, 65, 70; Bennett v. Hood, 1 Allen, 47. Many cases in other States are collected in Freem. Judgm. (4th ed.) § 237.

If I am right in my general views, they apply to this case. The plaintiff recovered her judgment in Connecticut, to be sure, as ancillary administrator there; but the horse was there, and she was entitled to it there, so that her judgment recovered there passed the title. Like any other transfer of a chattel, valid in the place where it was made, and where the chattel was situated, it will be respected elsewhere. The Connecticut law was not put in evidence, and therefore we must presume that a judgment there has whatever effect we attribute to it on the principles of the common law.

A dissenting opinion was read by KNOWLTON, J., *in which the Chief Justice concurred.*

Where a person makes a statement to another which he is untrue; which of the person making it does not believe to be true, and (2) expects the other person to act upon it in a certainty, (3) which the other person does to his loss — we have deceit.

CHAPTER XIII.

DECEIT AND KINDRED TORTS.

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§ 1.—DECEIT.

UNION PACIFIC RY. v. BARNES.

(64 Fed. 84.—1894.)

SANBORN, Circuit J. * * * This brief summary of the facts in this case is sufficient to show that the railway company was guilty of no actual fraud, of no intention to deceive, in its attempted sale and conveyance of this land. All that it did was done in the utmost good faith, and in the honest belief that it was the owner of the land under its grant. Nor did the company make any statement as of its own knowledge that this land was within its grant, or that it was the owner of it to induce the vendee to purchase. No oral representations whatever are proved, and the vendee is forced to rely upon the agreement of sale and the deed alone for proof of his allegations of false representations. No argument is required to show that the agreement of February 8, 1878, to sell the land and to cause a deed to be made to the purchaser conveying it in fee simple five years thereafter was no representation whatever that the company then owned it, or that it was then within its grant. It was nothing but a mere promise to sell the land, and to cause him who should be the owner five years thereafter to convey the title to the purchaser. It goes without saying that an action for false and fraudulent representations can never be maintained upon a promise or a prophecy. Kerr, Fraud & M. p. 85, note 3; Sawyer v. Pritchett, 19 Wall. 146, 163. Nor does the fact that the company made a deed of this land without covenants, and therein referred to its grant as the source of its title, furnish any sound basis for such an action, where, as in this case, the grantor was acting in good faith under claim and color of title, and in the

honest belief that it had derived a good title from the source it referred to, and that it was conveying such a title to its grantee.

Such an action requires for its foundation a false statement knowingly made, or a false statement made in ignorance of, and in reckless disregard of, its truth or falsity, and of the consequences such a statement may entail. The evil intent—the intent to deceive—is the basis of the action. Such an intent, it is true, may be inferred from the positive statement as of his own knowledge of a fact concerning which one knows he has no knowledge at all, because such a statement shows such a contempt for the truth, and such a reckless disregard of the rights of others who may rely upon it, that it is deemed sufficient evidence of an evil intent to warrant a recovery when damages have resulted from the falsehood. The record in this case is barren of any such statements or representations, and the proof is plenary that the company was acting under color of title, and in the utmost good faith. It will not do to say that whenever a title to land fails an action for false representations will lie against every grantor who has made a deed of the land, and recited therein the source of his title, which appeared to be, and which he then believed to be, good. Neither an agreement to sell land, and to cause a good title thereto to be conveyed to the purchaser at a future time, nor a deed without covenants which recites the supposed source of the grantor's title, and purports to grant and convey the land, is sufficient to support an action against the vendor for false and fraudulent representations as to his title where he makes the agreement and deed in good faith, under color and claim of title, in the honest belief that the title and its source are good, although in fact they are both invalid.[1]

[1] In Taylor v. Commercial Bank, 174 N. Y. 181, 185, 66 N. E. 726, 95 Am. St. R. 504 (1903), the court held that "the plaintiff was bound to prove, as to this statement, representation, falsity, scienter, deception, and resultant injury to the plaintiff," citing Arthur v. Griswold, 55 N. Y. 400; Brackett v. Griswold, 112 N. Y. 454, 20 N. E. 376.

ANONYMOUS.

(67 N. Y. 598.—1876.)

This was an appeal from an order of the General Term affirming an order of Special Term, which denied a motion on the part of defendants to vacate an order of arrest.

The order of arrest was based upon the provision of the Code (sec. 179, sub. 4), authorizing an arrest "when defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action was brought." The affidavits upon which the order of arrest was granted, showed substantially that defendants had for a number of years been doing an extensive business as bankers, living in great style, having a large banking-house and many employees, and that they were reputed to be very wealthy. Plaintiffs had been doing business with them for several years, believing them to be perfectly responsible. Plaintiffs purchased of them a sight draft on a London bank; at the time defendants were hopelessly insolvent, their assets being only sufficient to pay about forty per cent. of their indebtedness. This condition of affairs was known to them. Seven days after the draft was purchased defendants closed their doors and made an assignment. The draft was presented and payment refused. Defendants did not show what capital, if any, they had in their business, or by what disaster they became so largely insolvent, nor what reasons, if any, they had to hope they could continue on in their business. Held, that the order of arrest was properly granted.

Defendants' affidavit showed that when the draft was sold they had a large amount of money on deposit in the London bank. Before, however, the draft reached London, this deposit had been exhausted by prior drafts and letters of credit, and defendants had become largely indebted to the drawer. Held, that the fact of the deposit did not relieve defendants, and was of no importance. The court say:

"This is not like the case of a trader who has become embarrassed and insolvent and yet has reasonable hopes that by continuing in business he may retrieve his fortunes. In such a case he may buy goods on credit, making no false representations, without the necessary imputation of dishonesty. Nichols v. Pinner, 18 N. Y. 295;

Brown v. Montgomery, 20 id. 287; Johnson v. Morrell, 2 Keyes, 655; Chafee v. Fort, 2 Lans. 81. But it is believed that no case can be found in the books holding that a trader who was hopelessly insolvent, knew that he could not pay his debts and that he must fail in business, and thus disappoint his creditors, could honestly take advantage of a credit induced by his apparent prosperity and thus obtain property which he had every reason to believe he could never pay for. In such a case he does an act the necessary result of which will be to cheat and defraud another and the intention to cheat will be inferred."[1]

HART v. MOULTON.

(104 Wis. 349: 80 N. W. 599.—1899.)

MARSHALL, J. * * * The jury were then instructed, in effect, that though the goods were obtained of plaintiffs by false representations, plaintiffs could not recover if Nelson, notwithstanding such false representations, intended in good faith to pay for the property; that is to say, that to obtain property by purchase induced by representations however false, is not actionable fraud, whatever may be the actual result to the seller, in the absence of intent not to pay therefor. * * * *

From the foregoing the following principles may be stated as established: If a person misrepresent to another material facts, knowing, or under such circumstances, that he ought to know, the truth, for the purpose of inducing such other to sell property to him, and such other, without negligence, relying upon such representations, make the sale, he can, upon discovering the truth, rescind the transaction and recover back his property, saving the rights of *bona fide* purchasers or incumbrancers thereof in the meantime. To obtain property by false representations in the manner indicated, constitutes a substantive, actionable wrong, without regard to whether the vendee does or does not intend to pay for the subject of the purchase. If a person purchases property of another with intent

[1] Followed in, Cassidy v. Uhlman, 170 N. Y. 505, 63 N. E. 554, 79 Am. S. R. 596 (1902). See Wiser v. Lawler 189 U. S. 260, 23 Sup. Ct. 624, for a discussion of deception by silence.

not to pay for the same, the vendee may rescind the sale and recover back the subject thereof, as in case of the circumstances first stated. False representations to obtain the property are not a necessary element to make a complete cause of action under the circumstances covered by the second proposition, nor is intent not to pay essential to a complete cause of action under the circumstances covered by the first proposition. The former is complete by the concurrence of false representations of material facts, regarding which the falsifier knows or ought to know the truth, for the purpose of inducing a sale of property to him, and the consummated contract of sale, the seller relying upon such false representations. In such circumstances the law will not permit the wrongdoer to profit by his fraud if the wronged party otherwise elect, saving the rights of innocent third persons. The latter is complete by the purchase of property, the transaction being characterized by a secret, definitely formed intent on the part of the purchaser never to pay for the subject of the purchase. While false representations to obtain possession of the property, and insolvency of the purchaser, are evidence bearing on the existence of the fraudulent intent, neither of such elements is essential to a cause of action to recover back the property. They are evidentiary facts tending to show the fraudulent purpose not to pay. That is all. The two circumstances together, or that of false representations made to obtain possession of the property alone, may warrant a finding of the fraudulent intent mentioned, but the mere fact of undisclosed insolvency, of itself, is not sufficient.

Such stated principles are fatal to the judgment appealed from. The trial court was clearly wrong as to the law applicable to the evidence in the case.

STEWART v. STEARNS.

(63 N. H. 99.—1884.)

CLARK, J. The finding of the referee is authorized by the facts appearing in the case. If the defendant made false and fraudulent representations upon material matters, calculated and intended to mislead and prevent examination and inquiry as to the character and quality of the stock of goods, to induce the plaintiff to make the trade, and the plaintiff, in the exercise of ordinary prudence,

relying upon such representations as true, was induced to enter into the contract and was thereby defrauded, he is entitled to damages.

Upon competent evidence the referee has found that the defendant, knowing that the plaintiff was unacquainted with such goods as made up the stock in his store, both before the making of the written agreement and during the taking of the inventory, represented and stated to the plaintiff, in substance, that his stock was clean and desirable, and that the goods were of good styles and salable; that the plaintiff, relying upon the defendant's representations, did not make a careful examination of the goods, and did not avail himself of the means provided in the written agreement for fixing the prices of the goods; that the stock contained remnants of carpets, and both carpets and papers of old patterns and styles, which were not salable at the prices put upon them in the inventory, and nothing was said by the defendant to the plaintiff about this; and that the plaintiff relied upon the representations made by the defendant, and was deceived by them and by the suppression of facts relating to the stock. It is also to be assumed, from the finding of the referee for the plaintiff, that the defendant knew the representations were false, that they were made as statements of material facts to deceive the plaintiff and were not mere expressions of opinion, and that the plaintiff was justified in relying upon them. These questions of fact are included in the general finding. Noyes v. Patrick, 58 N. H. 618. If the representations were false, the defendant knew them to be so, and the conclusion is almost irresistible that they were made with intent to deceive and defraud. Benj. Sales, sec. 460.

It is objected that the plaintiff was not justified in relying upon the representations of the defendant, and that the referee erred in holding that the rule *caveat emptor* did not apply to this case. If the rule was of universal application, an action of deceit for false representations in a sale could never be maintained by the purchaser. It may be difficult to draw the line which separates cases within the rule from those to which it does not apply, as each case depends to some extent upon its peculiar circumstances; but it applies generally to cases free from actual fraud, where the parties deal upon an equal footing and with equal means of knowledge; and it is not applicable, as a general rule, where false and fraudulent representations of material facts are made by the vendor, and the parties have not equal facilities for ascertaining the truth. In such cases

When the seller goes beyond the limits of mere puffing and makes assertions of fact, he may be liable in deceit.

the purchaser has the right to rely upon the statements of the vendor; and when the purchaser is justified in relying upon the representations of the vendor, the rule *caveat emptor* does not apply.

Where the statements are of material facts, essentially connected with the substance of the transaction, and not mere general commendations or expressions of opinion, and are concerning matters which from their nature or situation are peculiarly within the knowledge of the vendor, the purchaser is justified in relying on them; and in the absence of any knowledge of his own, or of any facts which should excite suspicion, he is not bound to make inquiries and examine for himself. Under such circumstances it does not lie in the mouth of the vendor to complain that the vendee took him at his word. On the other hand, where the representations consist of general commendations or mere expressions of opinion, or where they relate to matters not peculiarly within the knowledge of the vendor, the purchaser is not justified in relying upon them, but is bound to examine for himself so as to ascertain the truth. 2 Pom. Eq. Juris. secs. 891, 892. In this case the parties were not on an equal footing, and had not equal means of knowledge. The defendant had an experience of fifteen years in trade, and knew the exact condition of his stock. The plaintiff had no acquaintance with such goods, and could learn nothing of their style and quality from an examination. The defects in the goods were to him undiscoverable defects. The representations made by the defendant related to material matters of fact, and the plaintiff was justified in relying on them. He was not guilty of negligence in assuming them to be true, nor was it his duty to employ a competent person to examine the goods.

In Poland v. Brownell, 131 Mass. 138, cited by the defendant in argument as a case strongly resembling the case at bar, it is stated in the opinion of the court "that the evidence showed that the plaintiff relied on his own examination and the advice of a friend, and for all that appeared both buyer and seller had equal means of information, and were equally well qualified to judge of the value of the property." * * * *

Judgment for the plaintiff on the report.[1]

[1] In Shelton v. Healy 74 Conn. 265, 50 At. 742 (1901), Torrance C. J. said: "The representation of the defendant as to the value of the stock is not, in this case, as claimed by the defendant, to be regarded as a mere expression of

BOYD'S EXRS. v. BROWNE.

(6 Pa., 310.—1847.)

This was an action on the case *sur deceit*, brought by William H. Brown & Co. against William R. Smith and Alexander Jordan, executors of John A. Boyd, deceased, to recover damages for false and fraudulent representations made by the defendant's testator, as to the credit of a third person. It was alleged in substance, in the declaration, that John A. Boyd falsely and fraudulently recommended one John B. Miller as a person worthy of being trusted for merchandise, and thereby induced the plaintiffs to sell him goods on credit to the amount of $389; that, at the time of such representations, the said Miller was not worthy of credit; that Boyd knew his representations to be false, and that Miller was at that time greatly indebted to him and various other persons, and in bad circumstances; that no part of the goods sold by plaintiffs had been paid for, and that the said John B. Miller was, and still is, wholly unable to pay for the same.

BELL, J. We see nothing exceptionable in the charge of the

opinion, but as a statement of fact, which may be the ground for an action of deceit. As a stockholder and director of the company from the time of its organization, and as its president and manager, the defendant possessed a special knowledge of the value of its stock, of which the plaintiff was ignorant; and the facts show sufficiently that the defendant knew that the plaintiff relied upon this statement as to the value of the stock. Gustafson v. Rustemeyer, 70 Conn. 125-133, 39 Atl. 104, 39 L. R. A. 644, 66 Am. St. Rep. 92; Lovejoy v. Isbell, 73 Conn. 368-375, 47 Atl. 682."

In Johnson v. Cavitt, 114 Ia. 183, 86 N. W. 256 (1901), it is said: "The other proposition, that the statement as to the price paid does not constitute a fraud, is sufficiently answered by this court in Dorr v. Cory, 108 Iowa, 725, 78 N. W. 682, a case quite similar in principle to the one at bar. It is there said: 'We cannot assent to the proposition that the statement of a vendor that he paid a specified price for the property he sells is a mere expression of opinion upon which the purchaser has no right to rely. On the contrary, we think it is a statement of fact; and if the purchaser, without knowing or having reason to know what price was paid, relies upon the false statement to his injury, he is entitled to relief.'—citing Teachout v. Van Hoesen, 76 Iowa, 113, 40 N. W. 96, 1 L. R. A. 664; Iler v. Griswold, 83 Iowa, 442, 49 N. W. 1023; Coles v. Kennedy, 81 Iowa, 360, 46 N. W. 1088; French v. Ryan, 104 Mich. 625, 62 N. W. 1016; Moon v. McKinstry, 107 Mich. 668, 65 N. W. 546; Stony Creek Woollen Co. v. Smalley, 111 Mich. 321, 69 N. W. 722."

court. The principles upon which this peculiar action is based were correctly stated, and the facts fairly put before the jury. The ground of action is the deceit practiced upon the injured party; and this may be either by the positive statement of a falsehood, or the suppression of material facts, which the inquiring party is entitled to know. The question always is, did the defendant knowingly falsify, or willfully suppress the truth, with a view of giving a third party a credit to which he was not entitled. It is not necessary there should be collusion between the party falsely recommending and he who is recommended; nor is it essential, in support of the action, that either of them intended to cheat and defraud the trusting party at the time. It is enough, if such has been the effect of the falsehood relied on. Misrepresentations of this character are frequently made from inconsiderate good nature, prompting a desire to benefit a third person, and without a view of advancing a party's own interests. But the motives by which he was actuated do not enter into the inquiry. If he make representations productive of loss to another, knowing such representations to be false, he is responsible as for a fraudulent deceit. These doctrines are fully established by the cases of Haly v. Free, 3 Term Rep. 51; Foster v. Charles, 6 Bing. 369; s. c., 7 Bing. 105; Corbit v. Brown, 8 Bing. 33; Allen v. Addington, 7 Wend. 9. In Foster v. Charles, when it was first in Westminster Hall, TINDAL, Ch. J., said: "It has been argued that it is not sufficient to show that a representation on which a plaintiff has acted was false within the knowledge of the defendant, and that damage has ensued to the plaintiff; but that the plaintiff must also show the motive which actuated the defendant. I am not aware of any authority for such a position; nor can it be material what the motive was. The law will infer an improper motive, if what the defendant says is false within his own knowledge, and is the occasion of damage to the plaintiff." All the other judges fully concurred in the soundness of those views, and indeed they recommend themselves by their intrinsic merit. But that part of the instruction chiefly complained of here is the direction to the jury, that the suppression of the fact by Boyd, that he had taken securities for large amounts from Miller in payment of the merchandise sold by Boyd to him, was evidence of fraud and deceit. The soundness of this opinion is fully shown by the authorities, and particularly by Corbit v. Brown, 8 Bing. 33; Allen v. Addington, 7 Wenw. 9, and Ward v. Centre, 3 Johns. Rep. 271. It is

scarcely necessary to add that in the case at bar there was abundant evidence, if believed, to establish the fact that Boyd took more than ordinary pains to inculcate a falsehood, which he must have known was untrue, for the purpose of inducing plaintiffs to credit Miller.

* * * * *

Judgment affirmed.[1]

WESTERVELT v. DEMAREST.

(46 N. J. L. 37.—1884.)

VAN SYCKEL, J. * * * It is clear that no contract was entered into between these parties, and that no recovery can be had on the ground of a contract liability. But the statement that directors and stockholders were responsible for all debts and engagements of the bank was false, to the knowledge of defendants, and therefore fraudulent. It appearing as one of the findings of fact in the case that the plaintiff made his deposits relying on the truth of this statement, he would be entitled to recover the loss he sustained by acting upon it, in an action for deceit. It also appears from the pass-book that entries to the credit of plaintiff were made in it by the bank officers on the 1st day of May and 1st day of November, in each year, from 1873 to 1879 inclusive. The return

[1] *Accord*, Endsley v. Johns. 120 Ill. 469, 60 Am. R. 572 (1887); Patten v. Gurney, 17 Mass. 182, 9 Am. Dec. 141 (1821); Morehouse v. Yeager, 71 N. Y. 594, (1877); Gainsville Natl. Bank v. Bamberger, 77 Tex. 48, 13 S. W. 959 (1890); Lang v. Lee, 3 Rand, (Va.) 410 (1825).

In Rhode Island, the court is not inclined to hold the defendant for statements about his own financial standing as strictly as for those about a third person. Lyons v. Briggs, 14 R. I. 222, 57 Am. R. 372 (1893); White & Co. v. Fitch, 19 R. I. 687, 36 At. 825 (1897); Vermont is not disposed to hold a person answerable in deceit for false assertions as to credit. Fisher v. Brown, 1 Tyler 387, 4 Am. Dec. 726; Jude v. Woodburn, 27 Vt. 415 (1855). See also Savage v. Jackson, 19 Ga. 305 (1856), criticising Pasley v. Freeman, 3 D. & E. 51 (1789).

In England, and in some of our jurisdictions, statutes have been passed providing that no action shall be brought upon such representations, unless made in writing and signed by the party to be charged therewith. Lord Tenderten's Act, 9 Geo. IV. ch. 14, § 6 (1829); Nevada Bank v. Portland Natl. Bank, 59 Fed. 338 (1894); applying the statute of Oregon;—1 Hill's Code, § 786, p. 594; Kimball v. Comstock, 14 Gray (80 Mass.) 508 (1860), applying the Massachusetts statute.

of this pass-book to the plaintiff on each of these occasions, with the aforesaid printed statement upon it, was a reiteration of the false representation, and it is manifest that thereby the plaintiff was induced to permit his deposits to remain and accumulate in the bank.

This deceit having been practiced by the defendants within six years, they could not avail themselves of the statute of limitations as a defense. Although recovery in this case cannot be maintained upon the basis of a contract, it is obvious that the granting of a new trial would be of no avail to the defendants, for the pleadings would be amended by the trial court, and upon the incontrovertible facts a verdict must necessarily pass in favor of the plaintiff for the loss the false representation has occasioned.

That loss was the sum deposited, with interest, being the same amount for which the verdict has been found in this case. The plaintiff being clearly entitled to recover the sum found, the necessary amendment may be made.

The rule to show cause should be discharged.[1]

[1] Cf. Fish v. Cleland, 33 Ill. 238; Cook v. Nathan. 16 Barb. 342 (1853); Davis v. Betz, 66 Ala. 206; Hirshfield v. London Ry. Co., 2 Q. B. D. 1, (1876), Hubbard v. McLean, 115 Wis. 9, 90 N. W. 1077 (1902), where there was a relation of trust or confidence between the parties. In Mutual Life Co. v. Phinney, 178 U. S. 327, 20 Sup. Ct. 906 (1900); Mr. Justice Brewer said: "And yet, as the court had already ruled that the law of New York controlled, that there was no forfeiture until the notice prescribed by the statute of that state had been given, the jury must have understood that when the agent said that the policy had lapsed, he made a false representation, and, therefore, that the action of the insured, based upon that false representation, did not amount to an abandonment. But whether that statement of the agent was correct in matter of law is doubtful; whether true or false, or, more accurately, whether correct or not, in its interpretation of the law applicable to this contract, is immaterial. It was merely a statement of what he supposed the law was, and the insured was under the same obligations to know the law that the company, or its agent, was. The jury evidently proceeded upon the supposition that the insurance company, located in New York, knew what the law of that state was; the insured, residing in Washington, did not, and when the agent stated what the condition of the contract was, he misrepresented the law of New York, of which the insured was ignorant, and, being ignorant, was not bound by any act based thereon in the way of abandonment or rescission. But surely no such rule as that obtains. When two parties enter into a contract, and make it determinable by the law of another state, it is conclusively presumed that each of them knows the law in respect to which they make the contract. There is no presumption of ignorance on the one side and knowledge on the other. Reverse the situation. Sup

Actual fraud must be shown to sustain an action for deceit.

KOUNTZE v. KENNEDY.

(147 N. Y. 129; 41 N. E. 414.—1895.)

ANDREWS, C. J. The plaintiffs on this appeal are met by the serious difficulty that the finding of the referee, affirmed by the General Term, exonerated the defendant's testator from the charge of fraud in making the representations upon which the plaintiffs relied in purchasing the bonds and stock of the Howe Machine Company. If this finding has support in the evidence it ends all controversy upon the merits here, because, although it was found that the statement of the liabilities of the company presented by Kennedy to the plaintiffs, upon the faith of which the purchase was made, was grossly inaccurate, and largely understated the actual liabilities of the company, nevertheless, if Kennedy believed the statement to be a true exhibit of the affairs of the company and was guilty of no dishonesty, the action must fail. The principle stated by CROKE, J., in 3 Bulst. 95, in respect to actions for damages for deceit, that "fraud without damage, or damage without fraud, gives no cause of action, but when these two concur an action lies," has ever since been recognized as the true rule governing the subject. The cases are numerous. The principle has been obscured by the use by judges of the phrase "legal fraud," which has sometimes been interpreted as meaning fraud by construction, and as indicating that something less than actual fraud may sustain an action for deceit. The gravamen of the action is actual fraud, and nothing less will sustain it. The representation upon which it is based must be shown not only to have been false and material, but that the defendant, when he made it, knew that it was false, or, not knowing whether it was true or false, and not caring what the fact might be, made it recklessly, paying no heed to the injury which might ensue. Misjudgment, however gross, or want of caution,

pose the insurance company had made this contract as a Washington contract, and there had been some peculiar provision of that state controlling all contracts made within the state: could the company, a corporation of New York, thereafter be permitted to say that it did not know what the law of Washington was; that the insured, as a resident of that state, must be presumed to have known it; that he did not communicate his information, and therefore it was not bound by that law, and that if he said anything in reference to it, it was a case of false representation or deceit? No one would contend this."

The law affords other remedies for the victim of innocent misrepresentation.

however marked, is not fraud. Intentional fraud, as distinguished from a mere breach of duty or the omission to use due care, is an essential factor in an action for deceit. The man who intentionally deceives another to his injury should be legally responsible for the consequences. But if, through inattention, want of judgment, reliance upon information which a wiser man might not credit, misconception of the facts or of his moral obligation to inquire, he makes a representation designed to influence the conduct of another, and upon which the other acts to his prejudice, yet, if the misrepresentation was honestly made, believing it to be true, whatever other liability he may incur he cannot be made liable in an action for deceit. The law affords other remedies for the consequences of innocent misrepresentation. A contract induced thereby may, in many cases, be avoided, and the equitable powers of courts are frequently interposed for the rescission of contracts or transactions based upon mistake or innocent misrepresentation. While the common-law action of deceit furnishes a remedy for fraud which ought to be preserved, we think it should be kept within its ancient limits, and should not by construction be extended to embrace dealings which, however unfortunate they may have proved to one of the parties, were not induced by actual intentional fraud on the part of the other. We have referred to a representation made without knowing whether it was true or false, and where the party making it was indifferent whether it was true or false, as sufficient to sustain the action if the representation was in fact untrue. The making of a representation to influence the conduct of the person to whom it is made, carries with it an assurance, necessarily implied from the situation, of the belief of the party making it in the truth of the affirmation. As was said by MAULE, J., in Evans v. Edmonds, 13 C. B. 777, "He takes upon himself to warrant his own belief of the truth of that he asserts, and a man who makes a representation which he neither knows nor cares whether it is true or not, can have no real belief in the truth of what he asserts, and is justly guilty of deception." So, also, it has been held that one who falsely asserts a material fact, susceptible of accurate knowledge, to be true of his own knowledge, and thereby induces another to act upon the fact represented to his prejudice commits a fraud which will sustain an action for deceit. This is not an exception to, but an application of, the principle that actual fraud must be shown to sustain such an action. The purpose of the party asserting his personal knowledge

is to induce belief in the fact represented, and if he has no knowledge, and the fact is one upon which special knowledge can be predicated, the inference of fraudulent intent in the absence of explanation naturally results. We shall refer to the subject again when we come to consider one of the points made by the plaintiffs. * * *

The learned counsel for the plaintiffs insist that the omission from the statement of liabilities of the claim against the Howe Machine Company in favor of the Credit Company, Limited, of England, was upon the undisputed facts a fraudulent concealment. The claim originated in or prior to 1878, and was based on acceptances alleged to have been made by the Howe Machine Company of drafts drawn by one Stockwell upon the company, accepted by his brother, the secretary and treasurer, in the name of the company. It seems to be conceded that the acceptances were made without authority of the company, and that the proceeds were used by the Stockwells in stock speculations in London on their own account. Suit was brought against the company on the drafts in the State of Connecticut in 1878, and as in all cases in that state were commenced by attachment. The company defended the action. In the fall of 1883 the facts were reported, and in 1886, two years after the plaintiffs had purchased their bonds, the court rendered judgment in the action against the Howe Machine Company for the sum of $62,475, the chief justice dissenting. The existence of this claim was not disclosed to the plaintiffs and was not embraced in the items of liabilities mentioned in the statement. It was claimed on the part of the defendant Kennedy that this item was omitted for the reason that the company was advised by counsel that the acceptances did not bind the company, and that it could not be made liable in the action, and evidence was given that neither the company nor its counsel regarded the claim as a valid obligation of the company. The referee further found that the defendant Kennedy and the other officers and directors of the company "had reasonable cause to believe that said company was not liable on said claims," and he refused to find the request of the plaintiffs, "that the said defendant (Kennedy) knew of said claim and suit, and concealed and intended to conceal the same from the plaintiffs."

The defendant's testator was bound to include in the statement all liabilities of the company known to him. He was not required to include claims made which were not valid or enforceable obligations. The defendant omitted this claim from the schedule because he

believed it was not a liability of the company. It may be admitted that he was blameworthy in not calling the matter to the attention of the plaintiffs, leaving them to determine whether it constituted a reason for declining the transaction. But if the nondisclosure was attributable to an honest belief that the claim was not valid and could not be enforced, the fraudulent intent is lacking, and the charge of deceit fails. * * * *

The plaintiffs requested the referee to find that the representations of Kennedy to the plaintiffs were so made as to convey the impression that he had actual knowledge of their truth and the referee refused to find as requested. This, it is urged, was error requiring a reversal of the judgment. It must be assumed that the referee found that the representations contained in the statement presented by Kennedy were not made, or understood by the plaintiffs to have been made, by him upon his personal knowledge. The evidence and the circumstances support this conclusion. Kennedy testified that, when the plaintiffs requested a statement of the assets and liabilities of the company, he informed them that he would request the secretary to prepare it, and after the statement was delivered to the plaintiffs, Luther Kountze, at Kennedy's request, went to Bridgeport to examine the property, and while there the items of the statement were gone over between him and Mr. Parmly, the person having the principal management of the business, and the referee found that the inquiries of Mr. Kountze were truthfully answered. It cannot be assumed from the mere form of the statement that the assets and liabilities were given upon the personal knowledge of Kennedy. It related to the affairs of a large corporation, widely extended and having agencies in a great number of the large cities of the country. It would ordinarily be understood that a statement furnished by the president or director of the company of its assets and liabilities would be furnished upon information derived from the books and other sources. Certainly the mere presentation of such a statement, without more, would not amount to an affirmation that the statement was true to his knowledge. There was conflicting evidence upon the trial upon the point whether, outside of the statement, such an affirmation was made, but that issue was decided against the plaintiffs. Their claim, therefore, that Kennedy represented that the statement was true of his own knowledge, rests solely on the facts that he was president of the corporation, and that he furnished the statement as a statement of the entire assets and liabilities. The most that the

plaintiffs could claim was that it became a question of fact, but we are of opinion that the evidence was wholly insufficient to have warranted a finding that Kennedy asserted the truth of the statement as of his own knowledge.

Upon a full examination of all the questions presented by the plaintiffs we have reached the conclusion that there was no material error committed on the trial, and the judgment should therefore be affirmed. All concur, except BARTLETT, J., who dissents on the ground that it is not proper for an officer of a corporation making a written statement of its indebtedness to a proposed purchaser of its stock to omit therefrom the amount involved in a pending action against the company for the reason that he is of opinion that the company will not be held in final judgment; that it is the manifest duty of such officer to inform the proposed purchaser of stock of the existence of this contingent liability, and the failure to do so is a fraud. PECKHAM, J., not voting.

Judgment affirmed.[1]

CHATHAM FURNACE CO. v. MOFFATT.

(147 Mass. 403.—1888

C. ALLEN, J. It is well settled in this Commonwealth that the charge of fraudulent intent, in an action for deceit, may be maintained by proof of a statement made, as of the party's own knowledge, which is false, provided the thing stated is not merely a matter of opinion, estimate or judgment, but is susceptible of actual knowledge; and in such case it is not necessary to make any further proof of an actual intent to deceive. The fraud consists in stating that the party knows the thing to exist, when he does not know it to exist, and if he does not know it to exist, he must ordinarily be deemed to know that he does not. Forgetfulness of its existence after

[1] In Johnson v. Cate, 75 Vt. 100, 53 At. 329, (1902), the court said: "And so the question is, could the representations of the defendant, in any view of the case, have been fraudulent, without actual knowledge on the part of the defendant of their falsity? We think they could. If the defendant had no more than an opinion or understanding that the claim had not been paid, it may well have been fraudulent for him to make an absolute representation that it had not been paid, and demand payment of the plaintiff."

a former knowledge, or mere belief of its existence, will not warrant or excuse a statement of actual knowledge. This rule has been steadily adhered to in this Commonwealth, and rests alike on sound policy and on sound legal principles. Cole v. Cassidy, 138 Mass. 437; Savage v. Stevens, 126 Mass. 207; Tucker v. White, 125 Mass. 344; Litchfield v. Hutchinson, 117 Mass. 195; Milliken v. Thorndike, 103 Mass. 382; Fisher v. Mellen, 103 Mass. 503; Stone v. Denny, 4 Met. 151; Page v. Bent, 2 Met. 371; Hazard v. Irwin, 18 Pick. 95. And though this doctrine has not always been fully maintained elsewhere, it is supported by the following authorities, among others: Cooper v. Schlesinger, 111 U. S. 148; Bower v. Fenn, 90 Penn. St. 359; Brownlie v. Campbell, 5 App. Cas. 925, 953, by Lord BLACKBURN; Reese River Mining Co. v. Smith, L. R. 4 H. L. 64, 79, 80, by Lord CAIRNS; Slim v. Croucher, 1 DeG. F. & J. 518, by Lord CAMPBELL. See, also, Peek v. Derry, 59 L. T. (N. S.) 78, which has been published since this decision was announced.[1]

In the present case the defendant held a lease of land, in which there was iron ore. The mine had formerly been worked, but operations had ceased, and the mine had become filled with water and debris. The defendant sought to sell this lease to the plaintiff, and represented to the plaintiff, as of his own knowledge, that there was a large quantity of iron ore, from 8,000 to 10,000 tons, in his ore bed, uncovered and ready to be taken out, and visible when the bed was free from water and debris. The material point was, whether this mass of iron ore, which did in truth exist under ground, was within the boundaries of the land included in the defendant's lease, and the material part of the defendant's statement was, that this was in his ore bed; and the representations were not in fact true in this, that while in a mine connecting with the defendant's shafts there was ore sufficient in quantity and location relative to drifts to satisfy these representations, if it had been in the land covered by the defendant's lease, that ore was not in the defend-

[1] This decision was reversed in the House of Lords; Derry v. Peek, 14 App. Cas. 337, 58 L. J. Ch. 864 (1889). In Angus v. Clifford (1891), 2 Ch. 449, 463, 60 L. J. Ch. 443, Lindley, L. J. said; "Speaking broadly of Peek v. Derry, I take it, that it has settled, once and for all, the controversy which was well known to have given rise to very considerable difference of opinion, as to whether an action for negligent representation, as distinguished from fraudulent representation, could be maintained. There was considerable authority that it could, and there was considerable authority that it could not."

ant's mine, but was in the adjoining mine; and the defendant's mine was in fact worked out.

During the negotiations, the defendant exhibited to the plaintiff a plan of the survey of the mine, which had been made for him, and the plaintiff took a copy of it. In making this plan, the surveyor, with the defendant's knowledge and assent, did not take the course of the first line leading from the shaft through which the mine was entered, but assumed it to be due north; and the defendant never took any means to verify the course of this line. In point of fact, this line did not run due north, but ran to the west of north. If it had run due north, the survey, which was in other respects correct, would have correctly shown the mass of iron ore in question to have been within the boundaries of the land covered by the defendant's lease; but in consequence of this erroneous assumption the survey was misleading, the iron ore being in fact outside those boundaries. It thus appears that the defendant knew that what purported to be a survey was not in all respects an actual survey, and that the line upon which all the others depended had not been verified, but was merely assumed; and this was not disclosed to the plaintiff. The defendant took it upon himself to assert, as of his own knowledge, that this large mass of ore was in his ore bed, that is, within his boundaries; and in support of this assertion he exhibited the plan of the survey, the first line of which had not been verified, and was erroneous. Now this statement was clearly of a thing which was susceptible of knowledge. A real survey, all the lines of which had been properly verified, would have shown with accuracy where the ore was situated. It was within the defendant's knowledge that the first line of the plan had not been verified. If under such circumstances he chose to take it upon himself to say that he knew that the mass of ore which had been discovered was in his ore bed, in reliance upon a plan which he knew was not fully verified, it might properly be found that the charge of fraudulent misrepresentation was sustained, although he believed his statement to be true.

The case of Milliken v. Thorndike, 103 Mass. 382, bears a considerable resemblance to the present in its facts. That was an action by a lessor to recover rent of a store, which proved unsafe, certain of the walls having settled or fallen in shortly after the execution of the lease. The lessor exhibited plans, and, in reply to a question if the drains were where they were to be according to the plans,

said that the store was built according to the plans in every particular; but this appeared by the verdict of the jury to be erroneous. The court said, by Mr. Justice COLT, that the representation "was of a fact, the existence of which was not open and visible, of which the plaintiff (the lessor) had superior means of knowledge, and the language in which it was made contained no words of qualification or doubt. The evidence fully warranted the verdict of the jury."[2]

Exceptions overruled.

EATON, COLE & B. CO. v. AVERY.

(83 N. Y. 31.—1880.)

RAPALLO, J. This is an action for deceit in obtaining the sale and delivery of goods to the firm of Avery & Riggins, by means of false representations made by the defendant as to the pecuniary condition of his firm. The representations charged were not made directly by the defendant to the plaintiff, but are alleged to have been made by him to a mercantile agency (Dun, Barlow & Co.), or its agent, and by it communicated to the plaintiff, who claims that it delivered the goods to Avery & Riggins on credit, on the faith of such representations. The counsel for the defendant contends that the plaintiff cannot maintain an action against the defendant for false representations made by him to Dun, Barlow & Co., or its agent, and that such representations, assuming them to have been made, are not sufficiently connected with the dealing between the defendant and the plaintiff to enable the latter to recover by reason thereof. On this point we are of opinion that the law was correctly stated by the learned judge before whom the trial was had, in his charge to the jury, wherein he instructed them that if the defendant, when he was called upon by the agent of Dun, Barlow & Co., made the statements alleged in the complaint as to the capital of the firm of Avery & Riggins, and they were false, and so known to be by the defendant, and were made with the intent that they should be com-

[2] In Waters v. Eaves, 105 Ga. 584, 32 S. E. 609 (1899), it is held that under § 4026 of the Civil Code of Georgia, a misrepresentation of a material fact, though made by mistake and innocently, if acted on by the opposite party, constitutes "legal fraud."

municated to and believed by persons interested in ascertaining the pecuniary responsibility of the firm, and with intent to procure credit and defraud such persons thereby, and such statements were communicated to the plaintiff and relied upon by it, and the alleged sale was procured thereby, the plaintiff was entitled to recover. The rule thus laid down accords with the principle of adjudications in analogous cases, in which it has been held that it is not essential that a representation should be addressed directly to the party who seeks a remedy for having been deceived and defrauded by means thereof. Cazeaux v. Mali, 25 Barb. 578; Newbery v. Garland, 31 id. 121; Broff v. Mali, 36 N. Y. 200; Morgan v. Skiddy, 62 id. 319; Commonwealth v. Call, 21 Pick. 515, 523; Commonwealth v. Harley, 7 Metc. 462. The principle of these cases is peculiarly applicable to the case of statements made to mercantile agencies. Proof was given on the trial as to the business and office of these agencies, but they are so well known, and have been so often the subject of discussion in adjudicated cases, that the courts can take judicial notice of them. Their business is to collect information as to the circumstances, standing and pecuniary ability of merchants and dealers throughout the country, and keep accounts thereof, so that the subscribers of the agency, when applied to by a customer to sell goods to him on credit, may, by resorting to the agency or to the lists which it publishes, ascertain the standing and responsibility of the customer to whom it is proposed to extend credit. A person furnishing information to such an agency in relation to his own circumstances, means and pecuniary responsibility, can have no other motive in so doing than to enable the agency to communicate such information to persons who may be interested in obtaining it, for their guidance in giving credit to the party; and if a merchant furnishes to such agency a willfully false statement of his circumstances or pecuniary ability with intent to obtain a standing and credit to which he knows that he is not justly entitled, and thus to defraud whoever may resort to the agency, and in reliance upon the false information there lodged, extend a credit to him, there is no reason why his liability to any party defrauded by those means should not be the same as if he had made the false representation directly to the party injured.

The counsel for the appellant is undoubtedly right in his general proposition that a false representation made to one person cannot give a right of action to another to whom it may be communicated,

and who acts in reliance upon its truth. If A, casually or from vanity makes a false or exaggerated statement of his pecuniary means to B, or even if he does so with intent to deceive and defraud B, and B communicates the statement to C, who acts upon it, A cannot be held as for a false representation to C. But if A makes the statement to B for the purpose of being communicated to C, or intending that it shall reach and influence him, he can be so held. In Commonwealth v. Call, 21 Pick 515, the court say on this point, at page 523, that the representation was intended to reach P and operate upon his mind; that it did reach him, and produced the desired effect upon him, and that it was immaterial whether it passed through a direct or circuitous channel.

In Commonwealth v. Harley, 7 Metc. 462, the prisoner was indicted for obtaining goods by false pretenses from G. B. & Co. The representations were made by one Cameron, in the absence of the prisoner Harley, to a clerk of G. B. & Co., who communicated them to a member of the firm. But there was evidence that they were made by Cameron with the approbation and direction of Harley, and these facts were held sufficient to sustain a conviction. Neither is it necessary that there should be an intent to defraud any particular person. Should A make a false statement of his affairs to B and then publicly hold out B as his reference, can it be doubted that he would be bound by the communication of his statement by B to any person who might inquire of him in consequence of this reference? That case differs from the present one only in the fact that here there was no express invitation to the public to call upon Dun, Barlow & Co. for information. But the defendant knew that they were a mercantile agency whose business it was to give information as to the standing and means of dealers, and that it was resorted to by merchants to obtain such information. By making a statement of the financial condition of his firm to such an agency he virtually instructed it what to say if inquired of. Can it make any difference whether he spontaneously went to the agency to furnish the information, or whether he gave it on application? He must have known that the object of the inquiry was not to satisfy mere curiosity, but to enable the agency to give information upon which persons applying for it might act, in dealing with the defendant's firm. The case is a new one in its facts, but the principles by which it should be governed are well established. * * * *

Judgment affirmed.

The plff is entitled to stand upon the assurance of defts trust defts assurance of its truthfulness.

DAVID v. PARK.

(103 Mass. 501.—1870.)

GRAY, J. Neither of the grounds assigned by the learned judge who presided at the trial, for the ruling, under which a verdict was returned for the defendant, in each of these cases, is tenable.

1. The evidence introduced tended to show that the defendant falsely and fraudulently stated, as of his own knowledge and not as a matter of opinion, in the one case, that he had the interest in the patent right which he undertook to sell, and in the other, that the invention was not covered by any other patent. A distinct statement of such a fact by a seller, knowing it to be false, and with the intent to deceive the buyer, and on which the buyer acts to his own injury, will sustain an action of deceit, even if the buyer might have discovered the fraud by searching the records of the patent office. Brown v. Castles, 11 Cush. 348; Manning v. Albee, 11 Allen, 520; S. C. 14 Allen, 7; Watson v. Atwood, 25 Conn. 313. * * * *

Exceptions sustained.[1]

KENNEDY v. McKAY.

(43 N. J. L. 288.—1881.)

BEASLEY, Ch. J. * * * But even if we were to assume that this stock was in reality the property of McKay, and that Halliard and Reid were his agents to make sale of it, still it is not apparent

[1] In Light v. Jacobs, 183 Mass. 206, 66 N. E. 799 (1903), the court said: "The defendants contend that the fact that the plaintiff made a separate and distinct investigation into the value of the property covered by the second mortgage prevents him from recovering. The case of Poland v. Brownell, 131 Mass. 138, 41 Am. Rep. 215, cited by the defendants, does not cover this point. It relates merely to sellers' talk. The rule is that it is not necessary that the false representations should have been the sole, or even the predominant, motive; it is enough if they had material influence upon the person deceived, although combined with other motives. Matthews v. Bliss, 22 Pick. 48; Safford v. Grout, 120 Mass. 20, 25; Windram v. French, 151 Mass. 547, 24 N. E. 914, 8 L. R. A. 750; Burns v. Dockray, 156 Mass. 135, 138, 30 N. E. 551."

The same view is taken in Handy v. Waldron, 19 R. I. 618, 35 At. 884, 49 Am. St. R. 794 (1896.)

upon what legal theory this present action could be sustained. To support this suit against McKay fraud must be imputable to him, and the case is entirely destitute of all testimony tending to show that he authorized, or was privy to the utterance of the false representations in question. On the ground thus assumed, then, the case would be that of a sale made by fraud-doing agents in behalf of an innocent vendor. Whatever uncertainty may at one time have prevailed in regard to the legal incidents of such a position, such uncertainty no longer exists, and the rights under the given circumstances of both vendor and vendee have been plainly defined, and, as I think, firmly settled by recent judicial decisions. In the light of such authorities it is clear that an innocent vendor cannot be sued in tort for the fraud of his agent in effecting a sale. In such a juncture the aggrieved vendee has at law two, and only two remedies; the first being a rescission of the contract of sale and a reclamation of the money paid by him from the vendors, or a suit against the agent, founded on the deceit. But in such a posture of affairs a suit based on the fraud will not lie against the inoncent vendor, on account of the deceit practised without his authority or knowledge by his agent. If the situation is such that the vendee can make a complete restitution, so as to put the vendor in the condition with respect to the property sold that he was in at the time of the sale, he has the right to rescind such contract of sale, and if the vendor, on a tender to that effect, refuses to return the money received in the transaction, a suit will lie for such money, but such refusal on the part of the vendor will not make him a party to the original wrong, so that he can be sued for the deceit. This is the doctrine declared with much clearness and force by Barons BRAMWELL and MARTIN in the case of Udell v. Atherton, 7 H. & N. 172, and their views on this subject were concurred in, and the principle propounded by them adopted and enforced by the House of Lords in Western Bank of Scotland v. Addie, L. R. I. Sc. App. 146. In this latter case the action was against the bank for deceit, which was alleged to consist in certain fraudulent representations, charged to have been made on a sale of stock to the plaintiff by the directors of such corporation as its agents. Lord CHELMSFORD, in giving his views, said: "The distinction to be drawn from the authorities, and which is sanctioned by sound principle, appears to be this: Where a person has been drawn into a contract to purchase shares belonging to a company, by fraudulent misrepresentations of the directors, and suit is brought

in the name of the company to seek to enforce this contract, or the person who has been deceived institutes a suit against the company to rescind the contract on the ground of fraud, the misrepresentations are imputable to the company, and the purchaser cannot be held to his contract, because the company cannot retain any benefit which they have obtained through the fraud of their agents. But if the person who has been induced to purchase shares by the fraud of the directors, instead of seeking to set aside the contract, prefers to bring an action for the deceit, such an action cannot be sustained against the company, but only against the directors personally." Lord CRANWORTH, in his opinion, puts himself on the same ground, and says: "A person defrauded by the directors, if the subsequent acts and dealings of the parties have been such as to leave him no remedy but an action for the fraud, must seek his remedy against the directors personally." It is obvious that the doctrine embodied in this decision, which is of so great weight as to be almost entitled to stand as authoritative in this court, if applied to the present case, will have the effect of taking from the plaintiff's suit, so far as it relates to Mr. MCKAY, every semblance of a foundation. By bringing his action in its present form the plaintiff has given up all idea of a rescission of the contract of sale, and the consequence is that, according to the doctrine of the cases cited, he must connect his last-named defendant with the fraud by which the sale was effected, if he would obtain a judgment against him. But in this he has altogether failed.

This rule should be made absolute.

ERIE CITY IRON WORKS v. BARBER.

(106 Pa. St. 125.—1884.)

Action of deceit by Barber & Co. against the Iron Works to recover damages sustained by the partial destruction of plaintiffs' mill by the explosion of a boiler which plaintiffs alleged had been deceitfully represented to them by defendant as safe and fit for use. The alleged deceit was practiced if at all by defendant's agent Selden.

A corporation is liable for fraud done by its agent or servant.

TRUNKEY, J. After disposing of various assignments of error. A corporation engaged in the manufacture of machinery ought to be responsible to purchasers the same as natural persons under similar circumstances. As it can only speak or act by agent, there is stronger reason for holding it answerable for the acts and representations of the agent done within the ostensible scope of his authority and while transacting the business of the principal, than where the principal is a natural person. However, the same rule applies alike to natural and artificial persons. The "purchaser can maintain an action of deceit against the innocent principal, when the fraud of the agent has been committed within the scope of his authority and when the principal has benefited by it. In this respect it makes no difference whether the principal be a corporation or an individual." Benjamin on Sales, vol. 2, § 708, 3 Eng., 4th Am. ed. "The principal is liable in a civil suit to third persons for the frauds, deceits, concealments, misrepresentations, torts, negligences and other malfeasances and misfeasances of his agent in the course of his employment, although the principal did not authorize, justify or participate in, or indeed know of such misconduct, or even if he forbade the acts or disapproved of them. This rule of liability is not based upon any presumed authority in the agent to do the acts, but on the ground of public policy, and that it is more reasonable when one or two innocent persons must suffer from the wrongful acts of a third person that the principal who has placed the agent in the position of trust and confidence should suffer, than a stranger." Lee v. Sandy Hill, 40 N. Y. 442. If a corporation be incapable of committing deceit, the safety of third persons with whom it deals by agent, requires that it be held liable in the proper action for the deceit of its agent perpetrated in such dealing. The learned judge of the Common Pleas did not err in submitting the case as if the deceit of the defendant's president and general manager was the deceit of the defendant.[1] * * *

[1] (Haskell v. Starbird, 152 Mass. 117; Busch v. Wilcox, 82 Mich. 336, *accord.*) In Wheeler v. Baars, 15 So. 584, at p. 589, 33 Fla. 696, the court said: "The proposition contained in the first charge of the court, to the effect that 'a principal is not liable civilly for the frauds and deceits of his agent committed in the course of his employment,' was clearly erroneous. It is well settled that for the deceit and false representations made by an agent in the course of his employment both the agent and his principal are civilly liable; and, so far as the liability of the principal is concerned, it makes no difference whether he authorized or was cognizant of the misrepresentation and deceit

§ 2.—SLANDER OF TITLE.

DOOLING v. BUDGET PUB. CO.

(144 Mass. 258.—1887.)

Tort, for an alleged libel, contained in the following words: "Probably never in the history of the Ancient and Honorable Artillery Company was a more unsatisfactory dinner served that that of Monday last. One would suppose, from the elaborate bill of fare, that a sumptuous dinner would be furnished by the caterer Dooling; but instead, a wretched dinner was served, and in such a way that even hungry barbarians might justly object. The cigars were simply vile, and the wines not much better." At the trial in the Superior Court, before PITMAN, J., the publication of the words by the defendant was admitted.

The plaintiff's counsel, in opening the case to the jury, stated that the plaintiff was a caterer in the city of Boston, with a very large business, and acted as caterer upon the occasion referred to. Upon the statement of the plaintiff's counsel that he should offer no evidence of special damage, the judge ruled, without reference to any question of privilege that might be involved in the case, that

of his agent or not. (1 Lawson, Rights, Rem. & Pr. §§ 112, 114, and authorities cited.)"

Rhoda v. Annis (75 Me. 17; 46 Am. R. 354) was an action to recover damages for deceit in the sale of a farm, the fraudulent representations having been made by defendant's son acting as her agent. Danforth, J., delivering the unanimous opinion of the court, said: "But it is denied that the defendant is liable in this form of action. It is said that being personally innocent of fraud, she cannot be convicted of that which has been committed by another with no authority from her, except that which results from his agency. This may be true in a criminal prosecution, but not in a civil action. If she is liable, that liability must be ascertained in the proper form of action. Here is no contract of any kind, express or implied, between the parties which can afford any remedy for the injury of which the plaintiff complains. He claims that a wrong, for which the defendant is responsible, has been done him. For that wrong he seeks a remedy. What remedy can he have except an action of tort? The counsel says two. He may rescind the contract, and recover back the consideration paid, or, in an action for money had and received, recover the profits accruing from the fraud. But neither of these may be adequate to his injury. Strang v. Bradner, 114 U. S. 551; City Bank v. Dunn, 51 Fed. 160; 58 Fed. 174, *accord.*

the words set forth were not actionable *per se*, and that the plaintiff could not maintain his action without proof of special damage; and, the plaintiff's counsel still stating that he should offer no evidence of special damage, directed a verdict for the defendant, and reported the case for the determination of this court. If the ruling was correct, judgment was to be entered on the verdict; otherwise, the case to stand for a new trial.

C. ALLEN, J. The question is, whether the language used imports any personal reflection upon the plaintiff in the conduct of his business, or whether it is merely in disparagement of the dinner which he provided. Words relating merely to the quality of articles made, produced, furnished or sold by a person, though false and malicious, are not actionable without special damage. For example, the condemnation of books, paintings and other works of art, music, architecture, and generally of the product of one's labor, skill or genius, may be unsparing, but it is not actionable without the averment and proof of special damage, unless it goes further, and attacks the individual. Gott v. Pulsifer, 122 Mass. 235; Swan v. Tappan, 5 Cush. 104; Tobias v. Harland, 4 Wend. 537; Western Counties Manure Co. v. Lawes Chemical Manure Co., L. R. 9 Ex. 218; Young v. Macrae, 3 B. & S. 264; Ingram v. Lawson, 6 Bing. N. C. 212. Disparagement of property may involve an imputation on personal character or conduct, and the question may be nice, in a particular case, whether or not the words extend so far as to be libelous, as in Bignell v. Buzzard, 3 H. & N. 217. The old case of Fen v. Dixe, W. Jones, 444, is much in point. The plaintiff there was a brewer, and the defendant spoke of his beer in terms of disparagement at least as strong as those used by the present defendant in respect to the plaintiff's dinner, wines and cigars; but the action failed for want of proof of special damage. In Evans v. Harlow, 5 Q. B. 624, 631, Lord DENMAN, Ch. J., said: "A tradesman offering goods for sale exposes himself to observations of this kind; and it is not by averring them to be 'false, scandalous, malicious and defamatory,' that the plaintiff can found a charge of libel upon them."

In the present case there was no libel on the plaintiff, in the way of his business. Though the language used was somewhat strong, it amounts only to a condemnation of the dinner and its accompaniments. No lack of good faith, no violation of agreement, no promise that the dinner should be of a particular quality, no habit of provid-

ing dinners which the plaintiff knew to be bad, is charged, nor even an excess of price beyond what the dinner was worth; but the charge was, in effect, simply that the plaintiff, being a caterer, on a single occasion provided a very poor dinner, vile cigars and bad wines. Such a charge is not actionable, without special damage.

Judgment on the verdict.

HATCHARD v. MEGE.

(18 Q. B. D. 771.—1887.

DAY, J. This is an application to set aside a nonsuit, which was directed by the Lord Chief Justice on the opening statement of counsel, and the question is whether the nonsuit was properly entered.

The statement of claim alleged that the defendants wrote and published "of and concerning the plaintiff and his said trade as a wine-merchant and importer the following false and malicious libel, that is to say:—

"Caution: Delmonico Champagne. Messrs. Delbeck & Co., finding that wine stated to be Delmonico champagne is being advertised for sale in Great Britain, hereby give notice that such wine cannot be wine it is represented to be, as no champagne shipped under that name can be genuine unless it has their names on their labels. Messrs Delbeck & Co. further give notice that if such wine be shipped from France they will take proceedings to stop such shipments, and such other proceedings in England as they may be advised,' thereby meaning that the plaintiff had no right to use the said registered trade-mark or brand for champagne imported or sold by him, and that in using such trade-mark or brand he was acting fraudulently, and endeavoring to pass off an inferior champagne as being of the manufacture of Messrs. Delbeck & Co., and that the champagne imported and sold by the plaintiff was not genuine wine, and that no person other than the defendants had the right to use the word 'Delmonico' as a trade-mark or brand, or part of a trade-mark or brand, of champagne in the United Kingdom."

The publication there set out is complained of as a libel on the

plaintiff in relation to his trade. It is substantially a warning not to buy Delmonico's champagne because it is not genuine. The statement of claim alleges that the publication is false and malicious; that would be a question for the jury; it is not for us to consider the facts of the case; we can only look at what was opened by the plaintiff's counsel and what appears on the pleadings. The innuendo charges that the defendants intended to convey the meaning that the plaintiff had no right to use his trade-mark or brand, and that the wine he sold was not genuine. It may be that the publication bears that meaning, and that the words used import dishonesty. The plaintiff has died, and the question to be decided is how much, if any part, of the cause of action survives. The statute 4 Edw. 3, 7, and the course of practice, make it clear that a civil action for libel dies with the death of the person libeled. It does not come within the spirit, and certainly not within the letter of the statute. There is, however, a further question whether a right of action can survive because injury to the plaintiff's trade-mark is alleged. Injury to trade is constantly alleged in actions for libel, and therefore that does not affect the question of survivorship. In the present case the second part of the statement of claim may be subdivided into two separate and distinct claims. The first is for ordinary defamation, either independently of the plaintiff's trade, affecting his character by charging him with being a dishonest man, or defamation of him in his trade by charging him with being a dishonest wine merchant. That claim would not survive, for it is nothing more than a claim in respect of a libel on an individual. But this publication may be construed to mean that the plaintiff had no right to use his trade-mark. This is not properly a libel, but is rather in the nature of slander of title, which is well defined in Odgers on Libel and Slander, c. v., p. 137, in the following passage: "But wholly apart from these cases there is a branch of the law (generally known by the inappropriate but convenient name—slander of title) which permits an action to be brought against any one who maliciously decries the plaintiff's goods, or some other thing belonging to him, and thereby produces special damage to the plaintiff. This is obviously no part of the law of defamation, for the plaintiff's reputation remains uninjured; it is really an action on the case for maliciously acting in such a way as to inflict loss upon the plaintiff. All the preceding rules dispensing with proof of malice and special damage are therefore wholly inapplicable to cases of this kind.

Here, as in all other actions on the case, there must be *et damnum et injuria.* The *injuria* consists in the unlawful words maliciously spoken, and the *damnum* is the consequent money loss to the plaintiff.

It appears, therefore, that the first and last parts of the innuendo in the present case suggest slander of title. As appears from the passage I have read, an action for slander of title is not an action for libel, but is rather in the nature of an action on the case for maliciously injuring a person in respect of his estate by asserting that he has no title to it. The action differs from an action for libel in this, that malice is not implied from the fact of publication, but must be proved, and that the falsehood of the statement complained of, and the existence of special damage, must also be proved in order to entitle the plaintiff to recover. The question whether the publication is false and malicious is for the jury. Here, I think, special damage is alleged by the statement of claim, and if the plaintiff could have shown injury to the sale of the wine which he sold under his trade-mark, he would have been entitled to recover, and that is a cause of action which survives.

For these reasons I am of opinion that the nonsuit was right so far as it related to the claim in respect of a personal libel, but was wrong as to the claim in respect of so much of the publication as impugned the plaintiff's right to sell under his trade-mark or brand.

There will, therefore, be an order for a new trial, but it will be limited to this latter part of the claim.

Order for a new trial.

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§ 8.—UNFAIR COMPETITION.

DRAPER v. SKERRETT.

(116 Fed. 206.—1902.)

ARCHIBALD, District Judge. The question of jurisdiction has been raised, and is therefore the first to be disposed of. If this were a suit for the infringement of a registered trade-mark, under the statute (Act March 3, 1881; 21 Stat. 502), the court would have

jurisdiction without regard to the amount in controversy (section 7). But as it stands, whatever is required to give jurisdiction must appear. Elgin Nat. Watch Co. v. Illinois Watch Case Co., 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365. It is to be remembered, however, in the present instance, that the plaintiff proceeds for the purpose of protecting his trade-name; and it is the value of that name, as measured by the damages to it, not only present, but prospective, which determines the amount in controversy. This the plaintiff avers in the bill to be above the sum of $2,000, and I think the claim is sustained by the evidence. The trade per year taken away by the defendants, if not restrained, would soon exceed that sum, if it does not now do so; and, as already intimated, that is the real guide. The damages to be awarded for the injury already inflicted are merely incident to the general relief prayed for, and do not control the question.

It must be admitted that the plaintiff has no right to use the term "French Tissue" as a trade-mark for the emollient paper which he puts up and puts upon the market. The word "French" is broadly geographic, indicating its origin, and the word "Tissue" is descriptive of its texture, and was applied to it in France, from whence it comes, long before it was introduced into this country. Neither singly, therefore, nor in combination, can these words be so employed. Canal Co. v. Clark, 13 Wall. 311, 20 L. Ed. 581; Lawrence Mfg. Co. v. Tennessee Mfg. Co., 138 U. S. 537, 11 Sup. Ct. 396, 34 L. Ed. 997; Brown Chemical Co. v. Meyer, 139 U. S. 540, 11 Sup. Ct. 625, 35 L. Ed. 247; Elgin Nat. Watch Co. v. Illinois Watch Case Co., 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365; Brennan v. Dry Goods Co., 47 C. C. A. 532, 108 Fed. 624. This is not to deny, however, that even geographical or local names, or those which originally were merely descriptive, may become so associated in an acquired or secondary significance with the goods manufactured or produced by a particular person as to identify and designate them in the general market as his especial production. Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118; Elgin Nat. Watch Co. v. Illinois Watch Case Co., 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365; Pillsbury-Washburn Flour Mills Co. v. Eagle, 30 C. C. A. 386, 86 Fed. 608, 41 L. R. A. 162; La Republique Française v. Saratoga Vichy Springs Co., 46 C. C. A. 418, 107 Fed. 459; Shaver v. Heller & Merz Co., 48 C. C. A. 48, 108 Fed. 821; American Waltham Watch Co. v. U. S. Watch Co., 173 Mass.

85, 53 N. E. 141, 43 L. R. A. 826, 73 Am. St. Rep. 263; Wotherspoon v. Currie, L. R. 5 H. L. 508; Montgomery v. Thompson [1891] App. Cas. 217; Reddaway v. Banham [1896] App. Cas. 199. But that is really another matter, and, however cognate, is sustained upon a different principle. It constitutes, not a trade-mark, but a trade-name, and is protected only where it is infringed by what has come to be known as "unfair competition." It is upon this that the plaintiff, having no valid trade-mark, is compelled to rely.

It may seem somewhat of a refinement to hold that certain terms are not entitled to protection as a trade-mark, and yet that their use may be restrained to the same extent as if they were, under the claim of a trade-name and the plea of unfair competition. This is evidently in the mind of Mr. Justice BROWN in Brown Chemical Co. v. Meyer, 139 U. S. 540, 11 Sup. Ct. 625, 35 L. Ed. 247, where he says:

"But if the words * * * cannot be appropriated as a trade-mark it is difficult to see upon what theory a person making use of these or similar words can be enjoined."

But it is nevertheless true that even without any strict proprietary interest, as a trade-mark, in the terms employed, a party is entitled to protection against the unfair use of them by another in the effort to take away the trade or custom which he has built up. This is established by a host of cases, which it would be an affectation to attempt to cite, but it is important to note the principle upon which they proceed. To justify a court of equity in interfering, there must be something more than the mere duplication by the one party of the other's trade-name. This is found in the deceptive use of imitative methods of display, or other devices by which the public are led into buying the infringer's goods when they intended to buy those of the original producer. The fraud which is thus perpetrated is a legitimate ground for equitable interference, and is the practical basis of it. As said by Mr. Chief Justice FULLER in Elgin Nat. Watch Co. v. Illinois Watch Case Co., 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365:

"The essence of the wrong consists in the sale of the goods of one manufacturer or vendor for those of another." And again: "Such circumstances must be made out as will show wrongful intent in fact, or justify that inference from the inevitable consequences of the act complained of."

So it is said by Lord HERSCHEL, in Reddaway v. Banham [1896] App. Cas. 199:

"In a case of this description, the mere proof by the plaintiff that the defendant was using a name, word, or device, which he had adopted to distinguish his goods, would not entitle him to any relief. He could only obtain it by proving further that the defendant was using it under such circumstances and in such manner as to put off his goods as the goods of the plaintiff."

The rule is forcibly put by MITCHELL, J., in Brown v. Seidel, 153 Pa. 74, 25 Atl. 1064, who, though dissenting from the rest of the court, expresses the true principle:

"Where the imitation is with intent to acquire, wrongfully and in an underhand manner, a portion of another's good will or business, equity will enjoin the attempt, as a fraud, though the imitation be not of a legal trade-mark. And such intent may be gathered from imitation of name, descriptive words used, size or style of package, color or shape or mode of application of label, general appearance, or any circumstances which afford basis for the inference of an intent to copy; and, where such intent is thus indicated, the actual resemblance need not be so close as to deceive any but the most careless buyers. It is enjoined, not as a deception of the public likely to be successful, but as an attempt to defraud the plaintiff. Any rule short of this is a premium on dishonesty, and an invitation to a commercial policy which measures its actions, not by conscience or right, but by ingenuity in dodging the law."

Judged by these tests, the relief asked for in the present instance should be granted.

BARRETT CHEMICAL CO. v. STERN.

(176 N. Y. 27: 68 N. E. 65.—1893.)

O'BRIEN, J. The plaintiff is the assignee of what is claimed to be a trade-mark, or business label, which had been adopted by another company some time before the asignment, and used to advertise a preparation known as "Roachsault," for destroying roaches and other insects. The defendant manufactures and sells an article to be used for the same purpose with what is alleged to be a trade-mark and label which describes the article as "Roach Salt." The plaintiff has condensed into one word the description of the article, with a peculiar spelling of salt, while the defendant uses two words with the ordinary and correct spelling. The plaintiff contends that the use by the defendant of the words and label amounts to a trespass or infringement of his trade-mark, and in this contention he has been sustained by the courts below, and the defendant has been enjoined

by the judgment from using the word in his business. The complaint avers the use by the defendant of a label sought to be enjoined in which the most prominent feature displayed is that of a large roach or insect, with the words "Stern's Insectago" upon the body of the insect, with other words descriptive of the article and what it does in the way of destroying insect life. The most prominent words upon the label are, "Warranted Chemical Roach Salt," and the last word contains the only possible similarity between the two labels. In all other respects they are entirely different. The defendant's label differs in size, color, workmanship, and descriptive words from that of the plaintiff, and any one intending to purchase the plaintiff's goods could not be misled by the defendant's label. It is not claimed or averred in the complaint that the public have been deceived by the use of the word by the defendant, or that there was any such intent or purpose on his part to deceive.

The question, therefore, is whether the plaintiff has such an exclusive proprietary right to the use of a common English word, or a combination of such words, as to entitle him to debar all others from the use of the same in the absence of fraud or intent to deceive. The word "roach" can be used as descriptive of the common insect whose life is sought to be destroyed by the use of the article, and so the word "salt" may be used, since it is a word in common use to describe chemical preparations and an article for the preparation of food. The two words may be united and used as one word to describe a salt to be used for the purpose of destroying roaches. Where a common word is adopted or placed upon a commercial article for the purpose of identifying its class, grade, style, or quality, or for any purpose other than a reference to or indication of its ownership, it cannot be sustained as a valid trade-mark. Words of this character correctly describing the purpose to which the article is to be put cannot be exclusively used as trade-marks. Columbia Mill Co. v. Alcorn, 150 U. S. 460, 14 Sup. Ct. 151, 37 L. Ed. 1144; Cooke & Cobb Co. v. Miller, 169 N. Y. 475, 62 N. E. 582. The office of a trade-mark is to point out distinctively the origin or ownership of the article to which it is affixed, and no sign or form of words can be appropriated as a valid trade-mark, which, from the fact conveyed by its primary meaning, others may employ with equal truth, and with equal right, for the same purpose. Elgin National Watch Company v. Illinois Watch Case Company, 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365. The sole question in the case

is whether the plaintiff has a technical trade-mark that has been invaded by the act of the defendant. Both parties are engaged in the same business, and both have made use of a common word to describe the character, quality, and use of an article for destroying insect life. The fact that the plaintiff made use of the word before the defendant did not give him the exclusive right to it, since it was merely descriptive of the article. There is no allegation or finding that any fraud was intended or committed, or that the defendant, by the use of the word, palmed off his goods to the public as the goods of the plaintiff. The case, in its legal aspect, is practically the same as if each party had labeled his goods "Roach Poison," instead of "Roach Salt." They are all common descriptive words, indicating to the purchaser of the article that it was a powder or preparation for destroying roaches or other insects; and when the two labels are compared with respect to size, color, character, and advertising caption, descriptive of the thing to which it is attached, they are so dissimilar that it is scarcely possible that any observer possessing reasonable intelligence who wanted to procure the plaintiff's goods would be likely to be deceived, or mistake the defendant's article for that of the plaintiff.

The judgment should be reversed, and new trial granted; costs to abide the event.

VAN HOBOKEN ET AL. v. MOHNS & KALTENBACH.

(112 Fed. 528.—1901.)

MORROW, Circuit Judge. The complainants are citizens of Rotterdam, Holland, and are distillers and selectors of gin. For many years they have exported gin to the United States in dark glass bottles of distinctive size and shape, having their firm name, address, and monogram blown into the glass. Each bottle bears upon one of its sides a label in a circular form, containing the words, "A. Van Hoboken & Co., Rotterdam, Holland," together with the monogram, "A—V—H"; and, in addition, the cork of each bottle is covered by a circular white label, printed in black, with a fanciful scroll and the words "A. Van Hoboken & Co.—Genever," together with the monogram "A—V—H." It is alleged that these labels, trade-name,

and monogram are respectively valid and subsisting trade-marks, and of very considerable value to the complainants. The respondent is a corporation organized and existing under the laws of the state of California, and having its principal place of business in the city of San Francisco, and dealing in liquors. The complainants charge the respondent with carrying on an unfair and fraudulent competition against complainants by refilling the complainants' bottles with a spurious gin of inferior quality, after the original contents have been removed in the course of trade, and palming off said spurious gin upon the public as and for the genuine bottled gin of complainants. Irreparable loss and damage are alleged to have been sustained by the complainants by reason of said fraud and unfair trade of the respondent, and this suit is brought for an injunction restraining the respondent from the alleged infringing acts, and for an accounting. The respondent makes a general denial of these charges.

It appears from the evidence that an agent of the complainants went to the respondent's place of business, and asked for some gin, indicating two bottles in the show window as the kind desired. These bottles had the complainants' name blown in the glass on the side of the bottle, and the monogram "A—V—H" on one of the upper corners thereof. It does not appear whether or not the paper labels were on the bottle or cork. The respondent's clerk took from a shelf a similar bottle, which the complainant's agent bought, paying therefore $1.35. On the same day the agent went again to the respondent's store, and purchased another bottle in the same manner, and for the same price. He received a receipt from the clerk in the form of a paid bill for each purchase, in which the purchase was described as "1 btl. gin, $1.35." These two bottles were introduced in evidence as exhibits, as well as a bottle exported by the complainants containing the gin manufactured by them. The bottles are identical in shape, size, color, and as to the name and monogram blown in the glass. The bottles bought by the complainants' agent, however, do not bear upon their sides or upon the cork any paper labels. The bottle of gin exported by the complainants was gauged by a customs gauger of San Francisco as being 98 proof, and the two bottles bought by the complainants' agent were gauged by the same gauger as 91 proof. It is admitted by the respondent that the two bottles sold to the complainants' agent did not contain the gin exported by the complainants. That gin is advertised and sold by it

as " A—V—H," $1.60 per bottle, while the gin sold to complainant's agent is advertised and sold as " M. & K. bottling, square black bottles, $1.35 per bottle." Respondent therefore contends that, although the bottles sold to complainants' agent were the same as those containing the complainants' gin, they did not bear the complainants' labels, and were not sold as and for the genuine bottled gin of complainants; that such sales were therefore not an infringement of the complainants' rights; that there has been no unfair competition, because, (1) there was no intent to deceive, (2) no notice or warning was given to respondent that complainants' rights were being affected, (3) no colorable imitation or attempt to imitate was made, and (4) under the facts no one could have been misled.

While it does not appear that the refilled bottles bore the printed labels of the complainant on the side and cork, the firm name and monogram were plainly to be seen in the glass itself. This monogram appears to be a registered trade-mark. It is so alleged in the complaint, and the certificate of registration appears as an exhibit with the deposition of Jacobus Van Hoboken. The firm name, " A Van Hoboken & Co.," is also alleged to have become a trade-name by user, and to be of special value to the complainants. If the paper labels had also been upon the refilled bottles, there would be no question but that infringement had been clearly established. Why should the absence of one of the trade-marks lessen the liability of an infringer, when the remaining trade-mark is a distinctive and characteristic feature of the marks usually placed on the goods? There is no particular coloring or descriptive design in the complainants' trade-marks to catch the attention of the purchaser and remain in the memory, but rather the combination of the letters " A—V—H." This monogram is the important feature of the trade-mark, and probably the controlling one in establishing the reputation of the complainants' manufacture in the mind of the public. The ordinary purchaser at retail would remember this mark, and the shape and color of the bottle, quite independently of the circular label and usual price. And unless it was especially called to his attention that such a bottle did not contain complainants' manufacture, the reasonable probability is that he would be deceived in making his purchase. A fundamental principle in the law of trade-marks is the protection of the owner of the trade-mark against fraud in its use by others. This fraud may consist in such use of a trade name or

mark as to induce purchasers to believe that they are obtaining the article which has won reputation under the particular name or mark. It has been held that, even where a geographical name has been adopted and claimed as a trade-mark and become a well-known sign and synonym for superior excellence, its use will not be permitted by persons residing at other places for the purpose by fraud and false representation of appropriating the good will and business which long-continued industry and skill and a generous use of capital has rightfully built up. Flour Mills Co. v. Eagle, 30 C. C. A. 386, 86 Fed. 608, 41 L. R. A. 162. And, following this doctrine, in La Republique Française v. Saratoga Vichy Springs Co., 46 C. C. A. 418, 107 Fed. 459, the court of appeals in the Second circuit held that a label upon bottles of manufactured Vichy water, even though displaying the fact that it came from another place than the original Vichy water, came within the spirit of this prohibition, because it untruthfully tended to mislead the unwary purchaser, and to gain the reputation which the Vichy natural springs had acquired. Respondent contends that here there was no intent to deceive in the refilling of the complainants' bottles with a different manufacture of gin. In N. K. Fairbank Co. v. Luckel, King & Cake Soap Co., 42 C. C. A. 376, 102 Fed. 327, Judge Hawley, speaking for the court of appeals for the Ninth circuit, said:

"It is not essential to the right of a complainant to an injunction to show absolute fraud or willful intention on the part of the respondent. * * * If the acts of the respondent in adopting the name of 'Gold Drop' constituted an infringement of the trade-mark or trade-name of the complainant, and it was put on the market in such a manner as to interfere with the legal rights of the complainant, to its loss and injury, it would be entitled to an injunction, irrespective of the question of any testimony as to actual fraud or willful intent."

And further on, with regard to the deception of the purchaser by appearances, the court says:

"There are many cases where respondent's packages and labels are to the eye so distinctive and unlike the packages of complainant as not to deceive purchasers exercising ordinary care, who are accustomed to the size of the packages and the general characteristics of the labels. But how about the stranger, who knows nothing about the packages or of the labels, but has read the advertisement, and remembers the same?"

In the case at bar, would not persons of ordinary intelligence, buying with usual care, seeing the firm name blown into the side of the bottle, and the distinctive trade-mark "A—V—H" also

plainly visible on the bottle, be led into the mistaken belief that they were purchasing the genuine article manufactured by the complainants? The answer must be in the affirmative, unless the attention of the purchaser was specially called to the fact that the bottle contained a different preparation. If we consider the case as one of unfair competition, the same result must follow. As was said in the various Hostetter Cases (C. C.) 84 Fed. 333, 107 Fed. 705, and 110 Fed. 524, the doctrine of unfair competition rests upon the proposition that men must be honest in their business transactions, and rely upon the merits of their own goods, and not undertake to palm off inferior goods as and for goods of the genuine manufacturer. Even if the respondent in the case at bar was using the bottles of complainants as a mere convenience, without dishonest motives, the custom of refilling receptacles bearing distinctive trade names or marks with other manufactures is too dangerous, and allows too great an opportunity for fraud against the owners of valuable preparations, to be permitted.

Let a decree be entered in favor of the complainants.[1]

NEWBRO v. UNDERLAND.

(—Neb.—; 96 N. W. 635. 1903.)

POUND, C. This is a suit to enjoin the defendant, who is engaged in the business of selling barber's supplies at wholesale, from adulterating a compound or preparation manufactured and sold by plaintiffs under the name of "Newbro's Herpicide," or "Herpicide"; from using the label, trade-mark, or bottles of the plaintiffs in the manufacture or sale of the adulterated compound; and from using the trade-mark of the plaintiffs in compounding mixtures or preparations to be put on the market by the defendant. The facts

[1] Compare Allen B. Wrisley Co. v. Iowa Soap Co., 122 Fed. 796, 59 C. C. A. 54 (1903), holding that "one who so names and addresses his product that a purchaser, who exercises ordinary care to ascertain the sources of its manufacture, can readily learn that fact by a reasonable examination of the boxes or wrappers that cover it, has fairly discharged his duty to the public, and to his rivals, and is guiltless of that deceit which is an indispensable element of unfair competition."

are stated clearly and concisely in the special findings of the trial court. The court found that the Newbro Drug Company, being the owner of the trade-name "Newbro's Herpicide" and of the trade-name "Herpicide," as applied to a liquid application for the hair, and also of a secret formula used in compounding such preparation, sold and transferred said formula to the plaintiffs, and also sold and transferred to them the trade-name "Newbro's Herpicide," and the trade-name "Herpicide," which names had been in use by plaintiffs and their assignor for more than two years prior to the bringing of suit; that the plaintiffs are the sole and exclusive owners of said trade-names "Newbro's Herpicide" and "Herpicide," and are entitled to the sole and exclusive use of said trade-names as applied to a liquid application for the hair; that said names are well known in business, have been extensively advertised, and large quantities of said preparation sold thereunder, and that said names are of considerable pecuniary value to the plaintiffs; that the defendant is engaged in the business of selling barbers' supplies, and for some months prior to the commencement of this suit, through his clerks and employees, has made, prepared, and compounded a preparation similar in appearance to said Newbro's Herpicide, and sold the same in original bottles of the plaintiffs, which had contained the original compound manufactured by the plaintiffs, with original printed "Herpicide" labels thereon, and also with labels thereon containing the word "Herpicide," which were intended to deceive the trade and the public in general; that the defendant, having compounded and prepared a preparation resembling plaintiff's herpicide in appearance, but which was not genuine herpicide, had for some months prior to the bringing of suit sold and placed upon the market for sale, under the label and trade-name of the plaintiffs, said spurious compound and preparation, for the purpose of deceiving the public, and leading them to believe that they were purchasing the preparation of the plaintiffs, which the plaintiffs had prepared and sold under the name of "Newbro's Herpicide" and "Herpicide." The court further found that the representations made by the plaintiffs on their labels and advertisements were not false or fraudulent, and, in particular, that the statements upon such labels and advertisements that dandruff was caused by microbes or parasites, and that the said preparation would cure baldness, and the address thereon, "Newbro Drug Co., 68 West Broadway, N. Y.," were not false or fraudulent, and were not intended to deceive. De-

cree was thereupon entered for the plaintiffs, substantially as prayed, from which the present appeal is taken.

The principal contention of the appellant is that the plaintiffs are entitled to no relief by reason of certain statements upon their printed labels and in their advertisements, which appellant claims are false and misleading, and have the effect of deceiving the public. The principle governing such cases is well stated in the recent case of Worden v. California Fig Syrup Co., 187 U. S. 516, 23 Sup. Ct. 161, 47 L. Ed. 282, in which the authorities are collated and discussed. In that case Mr. Justice SHIRAS puts the rule thus: "When the owner of a trade-mark applies for an injunction to restrain the defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not, in his trade-mark or in his advertisements and business, be himself guilty of any false or misleading representations; that, if the plaintiff makes any material false statement in connection with the property which he seeks to protect, he loses his right to claim the assistance of a court of equity; that where any symbol or label claimed as a trade-mark is so constructed or worded as to make or contain a distinct assertion which is false, no property can be claimed in it, or, in other words, the right to the exclusive use of it cannot be maintained." The statements upon plaintiffs' label to which appellant particularly calls attention are that plaintiffs' preparation is "the only remedy known that positively stops the hair falling out," that it is "a new scientific discovery," and that it "cures dandruff, baldness, and all diseases of the scalp by destroying the microbes or parasites to which all diseases of the scalp are due." The defendant challenges also the address upon the label, "Newbro Drug Co., 68 West Broadway, N. Y." It will be observed that the only statements of facts in this label are the address, and possibly the claims that plaintiffs' preparation destroys microbes and parasites to which diseases of the scalp are due, and that such diseases are caused by microbes or parasites. As to the address, it appears that the plaintiffs had an office in New York at the place named, but that their factory and principal place of business was at Butte, Mont. The label does not purport to say where the preparation is manufactured, or that its ingredients come from any particular place, or that any special virtue results from manufacture or preparation in one place rather than another. The address is obviously intended merely to notify the public where the manufactur-

ers and proprietors may be reached, and the choice of a great business center for an office for this purpose is natural, and in no way calculated to deceive.

There is a considerable amount of expert evidence in the record with reference to the causes of dandruff and baldness. The most that can be said with reference to this evidence is that it shows a conflict of opinion among experts upon the subject. It appears that some eminent authorities hold that dandruff is the result of a germ or parasite, and that statements to this effect are to be found in reputable, if not authoritative, text-books. So long as the question is an open one, we fail to perceive wherein there is any fraud in the plaintiffs' advertising that they cure diseases of the scalp by killing the germ or parasite by which such diseases are produced. It appears in evidence beyond contradiction that some of the principal ingredients of plaintiffs' preparation are germicides, and have the effect of killing microbes and parasites, such as, according to the plaintiffs' claim, cause the diseases in question. Those who believe that such diseases are caused by parasites will not be deceived by the plaintiffs' statements. Those who do not so believe, seeing that plaintiffs claim only to kill the germs or microbes, and do not pretend to cure the diseases in any other manner, are certainly in no danger of deception. In view of the expert evidence, there appears no reason to think that plaintiffs' claims in this respect are dishonest or fraudulent. The statements that the preparation is a "new scientific discovery," that it cures "all diseases of the scalp," and that it is the only known remedy "that positively stops the hair falling out," are clearly mere statements of opinion. They are possibly somewhat sweeping, or even extravagant. But they do not transcend the ordinary limits of what is usually considered fair advertising; and in a time when not merely superlatives, but the utmost resources of vocabulary, are scarcely able to meet the demands of everyday advertisements, are clearly innocuous.

In Samuel Brothers & Co. v. Hostetter Co., 118 Fed. 257, 260, 55 C. C. A. 111, the court say: "It is argued that no one preparation can possibly be a remedy for the numerous and divers ills for which the label declares this preparation to be adapted, and that the evidence for the appellant shows that a preparation containing so large a percentage of alcohol is contraindicated for many of those ailments. The court will not attempt a minute investigation of this field of inquiry. It is one upon which the experts differ. * * *

The argument that it is a quack medicine, and that it is injurious to the human system, and is contraindicated for some of the ailments which it purports to cure, comes with ill grace from those who imitate it as closely as they may without possessing a complete knowledge of its formula, and by unfair trade sell the simulated article as and for the genuine." The evidence shows that the defendant has been engaged in adulterating the plaintiffs' preparation, in using the bottles which had formerly contained such preparation, with their original labels, for the purpose of selling a preparation of his own, and in selling the adulterated preparation and a different compound, which he himself prepared, to persons who applied to him for the plaintiffs' herpicide. We think the decree of the district court is right, and should be affirmed.

It is therefore recommended that the decree be affirmed.

BISSELL CHILLED PLOW WORKS v. T. M. BISSELL PLOW CO.

(121 Fed. 857.—1902.)

COCHRAN, District Judge. * * * And, finally, it is urged by defendants' counsel that complainant has lost all right to any relief by reason of laches. It appears from the evidence that complainant became aware of the fact that defendant corporation had entered into the plow business shortly after it commenced, and continued aware of its being in that business, and its method of doing business, ever afterwards. This suit was not brought until 1899, about six years after the defendant corporation commenced business. About 1895 complainant began to advise with counsel as to its rights, but it never informed defendant corporation of any question as to its rights until the year 1898, when it caused to be sent to said defendant a copy of a bill that it intended filing in the state court against it. The effect of laches in cases of this character is so well settled by the decisions of the Supreme Court in the cases of McLean v. Fleming, 96 U. S. 245; Menendez v. Holt, 128 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 526, and Saxlehner v. Eisner, 179 U. S. 19, 21 Sup. Ct. 7, 45 L. Ed. 60, that the question is not open for discussion.

Simple laches, without more—which is the case here—is not sufficient to interfere with a complainant's right to injunctive relief, though it may affect his right to damages for past infringement. Counsel for defendants urge that it will affect complainant's right to injunctive relief where there is an absence of fraudulent intent on defendants' part, and that in this case there was absence of such intent. If fraudulent intent involves knowledge that it did not have a right to do as it did, there may have been an absence of fraudulent intent in this case. As I have before said, it is possible, if not probable, that defendants in good faith believed that they had a legal right to do as they have been doing. However this may be, it is certain that it intentionally adopted complainant's trade name—invaded his property—and that, in itself, in the eye of the law, was a fraud on its part. They must have known, also, that what they were doing had a tendency to, and in all reasonable probability would, pass off their goods as complainant's, and thus enable it to obtain a part of complainant's trade. It is a presumption that one intends the reasonable and probable consequences of his acts, so that I cannot avoid the conclusion that the defendant has intentionally appropriated to itself so much of complainant's business as it has been enabled to attract to itself by the means complained of. As said by Mr. Chief Justice FULLER in the case of Menendez v. Holt, *supra:*

"The intentional use of another's trade-mark is a fraud, and, when the excuse is that the owner permitted such use, that excuse is disposed of by affirmative action to put a stop to it. Persistence, then, in the use is not innocent, and the wrong is a continual one, demanding restraint by judical interposition when properly invoked."

But it does seem to me that the laches has been sufficient to defeat complainant's right to damages for past infringement within the doctrine of the cases of McLean v. Fleming, *supra,* and Menendez v. Holt, *supra.*

My decision therefore is that complainant is entitled to the injunctive relief prayed, and that its claim for damages be dismissed.

CHAPTER XIV.

NUISANCE.

§ 1.—PRIVATE NUISANCE.

LOWE v. PROSPECT HILL CEMETERY ASS'N.

(58 Neb. 94; 78 N. W. 488.—1899.)

RAGAN, C. The Prospect Hill Cemetery Association is a corporation organized under the laws of the state. As its name indicates, it is engaged in the business of interring the dead, and in conducting and maintaining a cemetery, in the city of Omaha. * * * In Gilford v. Babies' Hospital, 1 N. Y. Supp. 448, the court enjoined the proposed opening of a hospital for the care of infants, on the ground that the locality in which it was proposed to locate the hospital was a residential locality, and that the probability of contagious diseases being disseminated in the neighborhood would threaten the comfort and security of the inhabitants. In Hurlbut v. McKone, 55 Conn. 31, 10 Atl. 164, the maintenance of a planing and molding mill near the plaintiff's home was enjoined as a private nuisance, on the ground that the smoke and dust from it interfered with the comfortable and reasonable use and enjoyment of the plaintiff's home. In Rodenhausen v. Craven, 141 Pa. St. 546, 21 Atl. 774, the establishing of a carpet-cleaning establishment in the residence locality of the city was enjoined upon the ground that the dust arising from the cleaning of carpets would invade the homes of the people living near by, and disturb their reasonable enjoyment of their homes. To the same effect, see Haugh's Appeal, 102 Pa. St. 42; Appeal of Pennsylvania Lead Co., 96 Pa. St. 116; Adams v. Car Co., 131 Ind. 375, 31 N. E. 57; Clowes v. Waterworks Co., 8 Ch. App. 125. In Farrell v. Cook, 16 Neb. 483, 20 N. W. 720, the owner of some jacks and stallions was enjoined from keeping and standing them for mares in view of the plaintiff's dwelling, upon the ground that such a use of the defendant's property offended against the laws of decency, and was therefore a private nuisance. In Barton v. Cattle Co., 28 Neb. 350, 44 N. W. 454, it was ruled that the pollu-

tion of a stream of water, by discharging into it the dung, urine, etc., of a large feed stable, thus rendering the water unfit for use, and creating a stench, constituted a nuisance, and should be enjoined. In Association v. Peterson, 41 Neb. 897, 60 N. W. 373, it was held that the befouling of a well or cellar by filthy and noxious matter, permitted by the defendant to percolate through the adjacent soil, constituted a nuisance. To the same effect is Gas Co. v. Thomas, 41 Neb. 662, 59 N. W. 925. These cases, then, are authority for the proposition that a use made by one of his property which works an irreparable injury to the property of his neighbor; the use made by one of his property whereby the unwritten, but accepted, law of decency is violated; the use made by one of his property whereby his neighbor is deprived of the reasonably comfortable use and enjoyment of his own property; the use made by one of his property which will probably or likely endanger the health and the life of his neighbor,—is a private nuisance.

9. Another argument is that the appellees cannot maintain this suit, because it is said that the appellees Pruitte and Stevens are not the owners of the title to the premises occupied by them. At the time of the institution of this suit, Pruitte was occupying under a contract of purchase. He had paid the purchase money, and made improvements upon the real estate, but his contract was held in trust for him by his mother, who lived in his family. Stevens had fee-simple title to his property, but at the time this suit was brought a proceeding to foreclose a mortgage on the lot had been instituted, gone to decree, and before the trial, at least, the sale of the property occurred. An appeal had been taken from this to the Supreme Court, and the sale superseded by bond. Notwithstanding all these things Pruitte and Stevens, at the time this suit was brought and at the time of the trial, were the owners of the real estate upon which they resided. Trust Co. v. Gustus, 55 Neb. 435, 75 N. W. 1107; Leader v. Tierney, 45 Neb. 753, 64 N. W. 226. We do not understand that, to enable the plaintiff to maintain a suit like this, it is necessary that he should be vested with the legal title to the real estate upon which he lives. The object of this action, and such actions as this, is to prevent the defendant from putting his property to such a use as would disturb the plaintiff in the reasonable use and occupation of the property on which he resides; and we see no reason why a tenant for years or for life, rightfully in possession of real estate, might not maintain such an action as this. Jung v. Neraz,

71 Tex. 396, 9 S. W. 344; Smith v. Phillips, 8 Phila. 10; Railroad Co. v. English, 73 Ga. 366.

The decree under consideration does not rest solely upon the proposition that to permit the appellant to use his property for cemetery purposes would depreciate the value of the real estate of the appellees, but it is grounded upon the theory that to permit the appellant to use its property for cemetery purposes would deprive the appellees of the reasonably comfortable use and occupancy of the premises of which they are in the rightful possession, and endanger their health and lives and that of their families.

LYNN v. HOOPER.

(93 Me. 46: 44 At. 127.—1899.)

SAVAGE, J. Action for personal injuries occasioned by an alleged nuisance. The plaintiff claims that while traveling upon the highway adjacent to the defendant's land his horse became frightened by a hay cap placed by the defendant over a bunch of her hay standing upon or near the highway, and that the horse bolted against a fence on the opposite side of the road, whereby the plaintiff was thrown out of his wagon, and sustained the injuries complained of. The verdict was for the plaintiff. The defendant asks us to set the verdict aside as being contrary to the law and the evidence. * * * *

Was this cap of such a character, and so placed, as to constitute a nuisance? In this case, if the hay cap was a nuisance, it was so because it endangered the public use of the way. Staples v. Dickson, 88 Me. 362, 34 Atl. 168. A thing may be a nuisance because it interferes with or endangers public travel, although it does not of itself constitute an obstruction in the highway. An object at the side of a highway of such a character that it is naturally calculated to frighten horses of ordinary gentleness may constitute a nuisance. Elliott, Roads & S. 482; Cooley, Torts, 617. It is impossible to state a general rule by which it can be determined whether any particular object constitutes a nuisance or not. The question must depend upon the conditions and circumstances in each case. Conditions

vary. No two cases are alike. Hence it is rare that one case can be a binding precedent for another.

Its distance from the traveled path, its relation to fences and other objects, its height or depth from the road, its color, whether it is customarily found in similar places and under similar conditions, whether it is so situated that horses being driven come suddenly in sight of it, whether it is in repose, or whether it is fluttering like a living thing,—these and many other considerations must be taken account of in determining whether the object is a nuisance, or is dangerous to public travel. This suggestion is fully borne out by an examination of cases concerning objects causing fright, some of which we cite: A pile of shingles,—Merrill v. Hampden, 26 Me. 234; Lawrence v. Mt. Vernon, 35 Me. 100; evergreen tree standing in cart,—Davis v. Bangor, 42 Me. 522; a rock,—Card v. Ellsworth, 65 Me. 547; a cow,—Perkins v. Fayette, 68 Me. 152; a hole,—Spaulding v. Winslow, 74 Me. 528; a pile of stones,—Clinton v. Howard, 42 Conn. 294; a pile of plastering,—Dimock v. Suffield, 30 Conn. 129; a tent,—Ayer v. Norwich, 39 Conn. 376; a watering trough painted red,—Cushing v. Bedford, 125 Mass. 526; bales of hay charred by fire,—Morse v. Richmond, 41 Vt. 435; a hollow log blackened by fire,—Forshay v. Glen Haven, 25 Wis. 288; sled with tubs on it,—Judd v. Fargo, 107 Mass. 264; rubbish,—Burgess v. Gray, 1 Man., G. & S. 578. See, also, cases in note in Elliott, Roads & S. 449. Most of these objects were held to be nuisances, or imperiling travel.

In the present case the court is of opinion that a jury might properly find that the defendant's hay cap was situated within the highway, and that, by reason of its color, shape, situation, and motion, it was naturally calculated to frighten a horse of ordinary gentleness. If so, it was unlawfully there, and the defendant is to be held responsible for the natural consequences. There are no legal impediments to the maintenance of the action.

The facts have been passed upon by the jury, and we perceive no sufficient reason for disturbing their finding.

Motion overruled.

BOHAN v. P. J. G. L. CO.

(122 N. Y. 18.—1890.)

BROWN, J. The plaintiff made no complaint of the existence of a nuisance upon defendant's property prior to 1880, when defendant first introduced the use of naphtha in the manufacture of its gas, and it was a disputed question on the trial, upon which there was a strong conflict of testimony, whether the smells from the defendant's works, after it began to use naphtha, were more offensive than when it used coal.

This question, it must be assumed, the jury determined in favor of the plaintiff's contention. The court charged the jury that, to constitute a nuisance, it was essential that the smells and odors from the defendant's works should be sufficient "to contaminate and pollute the air and substantially interfere with the plaintiff's enjoyment of her property," and that the question for them to determine was, "Did the odor pollute the air so as to substantially render plaintiff's property unfit for comfortable enjoyment?" An exception was taken by the defendant to this part of the charge.

The rule stated by the learned judge was in accordance with all the authorities. If one carry on a lawful trade or business in such a manner as to prove a nuisance to his neighbor, he must answer in damages, and it is not necessary to a right of action that the owner should be driven from his dwelling; it is enough that the enjoyment of life and property be rendered uncomfortable. Rex v. White, 1 Burr. 337; S. H. S. Co. v. Tipping, 11 H. L. Cas. 642; Fish v. Dodge, 4 Denio, 311; Catlin v. Valentine, 9 Paige, 575; Campbell v. Seaman, 63 N. Y. 568; Cogswell v. N. Y., N. H. & H. R. R. Co., 103 id. 10; Wood on Nuis. sec. 497.

It was claimed by the defendant, and the court refused a request to charge "that unless the jury should find that the works of the defendant were defective, or that they were out of repair, or that the persons in charge of manufacturing gas at these works were unskillful and incapable, their verdict should be for the defendant;" and "that if the odors which affect the plaintiff are those that are inseparable from the manufacture of gas with the most approved apparatus and with the utmost skill and care and do not result from any defects in the works, or from want of care in their manage-

ment, the defendant is not liable." An exception to this ruling raises the principal question discussed in the case.

While every person has exclusive dominion over his own property, and may subject it to such uses as will subserve his wishes and private interests, he is bound to have respect and regard for his neighbor's rights. The maxim "*Sic utere tuo ut alienum non lædas*" limits his powers. He must make a reasonable use of his property, and a reasonable use can never be construed to include those uses which produce destructive vapors and noxious smells, and that result in material injury to the property and to the comfort of the existence of those who dwell in the neighborhood.

The reports are filled with cases where this doctrine has been applied, and it may be confidently asserted that no authority can be produced, holding that negligence is essential to establish a cause of action for injuries of such a character. A reference to a few authorities will sustain this assertion. In Campbell v. Seaman, *supra*, there was no allegation of negligence in the complaint, and there was an allegation of due care in the answer. There was no finding of negligence, and this court affirmed a recovery. In Heeg v. Licht, 80 N. Y. 579, an action for injuries arising from the explosion of fireworks, the trial court charged the jury that they must find for the defendant, "unless they found that the defendant carelessly and negligently kept the gunpowder on his premises." And he refused to charge, upon the plaintiff's request, "that the powder magazine was dangerous in itself to plaintiff, and was a private nuisance, and defendant was liable to the plaintiff, whether it was carelessly kept or not." There was a verdict for the defendant, and this court reversed the judgment, holding that the charge was erroneous. In Cogswell v. N. Y. & N. H. R. R. Co., *supra*, the Special Term found, as facts, that in the construction of the engine-house and coal-bins, and in the use of its premises, the defendant exercised due care, so far as the same was practicable, and it refused to find, upon plaintiff's request, "that in the construction of the engine-house, chimney, smokepipe and coal-bins, it had not exercised, and does not now exercise, such reasonable and proper care as was necessary not to injure the plaintiff's property." A judgment for the defendant was reversed, this court holding that the engine-house as used was a nuisance, and that it was not an answer to the action that the defendant exercised all practicable care in its management. In Pottstown Gas Co. v. Murphy, 39 Penn. St. 257, the charge of the

court, and the refusals to charge, were very similar to the charge in this case. The Supreme Court of Pennsylvania overruled the exceptions, holding that negligence was not essential to a right of recovery. To the same effect see Cleveland v. C. G. L. Co., 20 N. J. Eq. 201; O. G. L. & C. Co. v. Thompson, 39 Ill. 598; Wood on Nuis. (2d. ed.) sec. 553.

The principle that one cannot recover for injuries sustained from lawful acts done on one's own property without negligence and without malice, is well founded in the law. Every one has the right to the reasonable enjoyment of his own property, and so long as the use to which he devotes it violates no rights of others, there is no legal cause of action against him. The wants of mankind demand that property be put to many and various uses and employments, and one may have, upon his property, any kind of lawful business, and so long as it is not a nuisance, and is not managed so as to become such, he is not responsible for any damage that his neighbor accidentally and unavoidably sustains. Such losses the law regards as *damnum absque injuria*. And under this principle, if the steam boiler on the defendant's property, or the gas retort, or the naphtha tanks had exploded and injured the plaintiff's property, it would have been necessary for her to prove negligence on the defendant's part, to entitle her to recover. Losee v. Buchanan, 51 N. Y. 476.

But where the damage is the necessary consequence of just what the defendant is doing, or is incident to the business itself, or the manner in which it is conducted, the law of negligence has no application and the law of nuisance applies. Hay v. Cohoes Co., 2 N. Y. 159; McKeon v. See, 51 id. 300.

The exception to the refusal to charge the first proposition above quoted was not, therefore, well taken.

It is contended, however, by the defendant, that the acts of the legislature relating to gas companies are a protection from liability for consequential injuries flowing from the manufacture of gas, or the prosecution of the business, when want of care forms no element of the cause of injury, and it is sought to apply to this case the broad principle that that which the law authorizes cannot be a nuisance, although it may occasion damages to individual rights and property. [Upon this point the judge adopts the doctrine of 108 U. S. 317, *supra*.]

These views lead to the conclusion that the defendant obtained no immunity from liability for consequential injuries sustained by

property surrounding its works by reason of its incorporation, or the privilege conferred upon the business by the acts of the legislature, and that the facts of the case do not take it out of the operation of the rules of law applicable to ordinary common-law nuisances.

The legislature has given to the corporations created to manufacture gas the right to lay down their conductors in the public streets subject to the control and regulation of the municipal authorities, and for acts done in the execution of that privilege they are exempt from prosecution at the suit of the people.

The choice, however, of the place to locate their works, and the selection of materials from which to manufacture gas, had been left to the corporations, and those things must be performed with reference to the rights of others.

The fact appears in this case that for twenty years the defendant conducted its business without annoyance to any one. For the sake of economy (so it alleges) it adopted, in 1880, a new process and new materials from which to make its gas. The result, under the finding of the jury, has been to impair the value of the plaintiff's property and substantially to interfere with its comfortable enjoyment. If the defendant's contention should prevail, there would be no restraint upon the location of the business, and no limit to the offensive character of the materials it might use. It would thus have an immunity which the law denies to every other citizen.

We think the proof permitted the conclusion that the defendant had created a nuisance, and that there was no error in the charge of the court, or the refusal to charge.

The judgment must be affirmed.

HAIGHT, J. (dissenting). This action was brought to recover damages alleged to have been sustained by the plaintiff in consequence of offensive odors proceeding from the gas-works of the defendant, and to obtain an injunction restraining the defendant from permitting further emissions of such odors.

The complaint alleges negligent and unskillful construction of the works, and also negligence in the use and maintenance thereof. * * * *

The question is thus presented as to whether the works of the defendant are, in the absence of negligence either in their construction or operation, a nuisance *per se*, for if the odors emanating therefrom are inseparable from the manufacture of gas with the most ap-

proved apparatus and with the utmost skill and care, and do not result from any defects in their management, it follows that all works for the manufacture of gas are nuisances as to those living near enough to the plant to be affected by the odor, even though they located there subsequent to the works. The question is one of importance. It is not free from difficulty, and the authorities treating upon the subject are not in entire harmony.

A nuisance, as it is ordinarily understood, is that which is offensive and annoys and disturbs. A common or public nuisance is that which affects the people and is a violation of a public right, either by direct encroachment upon public property or by doing some act which tends to a common injury, or by the omitting of that which the common good requires, and which it is the duty of a person to do. Public nuisances are founded upon wrongs that arise from the unreasonable, unwarrantable or unlawful use of property, or from improper, indecent or unlawful conduct working an obstruction or injury to the public and producing material annoyance, inconvenience and discomfort. Founded upon a wrong, it is indictable and punishable as for a misdemeanor. It is the duty of individuals to observe the rights of the public and to refrain from the doing of that which materially injures and annoys or inconveniences the people, and this extends even to business which would otherwise be lawful, for the public health, safety, convenience, comfort or morals is of paramount importance, and that which affects or impairs it must give way for the general good. In such cases the question of negligence is not involved, for its injurious effect upon the public makes it a wrong which it is the duty of the courts to punish rather than to protect. But a private nuisance rests upon a different principle. It is not necessarily founded upon a wrong, and consequently cannot be indicted and punished as for an offense. It is founded upon injuries that result from the violation of private rights and produce damages to but one or few persons. Injury and damage are essential elements, and yet they may both exist and still the act or thing producing them not be a nuisance. Every person has a right to the reasonable enjoyment of his own property, and so long as the use to which he devotes it violates no rights of another, however much damage others may sustain therefrom, his use is lawful and it is *damnum absque injuria*. Thurston v. Hancock, 12 Mass. 222.

So that a person may suffer inconvenience and be annoyed, and if the act or thing is lawful and no rights are violated, it is not such

a nuisance as the law will afford a redress; but if his rights are violated, as for instance if a trespass has been committed on his land by the construction of the eaves of a house so that the water will drip thereon, or by the construction of a ditch or sewer so that the water will flow over and upon his premises, or if a brick kiln be burned so near his premises as that the noxious gases generated therefrom are borne upon his premises, killing and destroying his trees and vegetation, it will be a nuisance for which he may be awarded damages. Campbell v. Seaman, 63 N. Y. 568.

Hence it follows that in some instances a party who devotes his premises to a use that is strictly lawful in itself may, even though his intentions are laudable and motives good, violate the rights of those adjoining him, causing them injury and damage, and thus become liable as for a nuisance. It, therefore, becomes important that the courts should proceed with caution and carefully consider the rights of the parties and not declare a lawful business a nuisance except in cases where rights have been invaded, resulting in material injury and damage. People living in cities and large towns must submit to some inconvenience, annoyance and discomforts. They must yield some of their rights to the necessity of business, which, from the nature of things, must be carried on in populous cities. Many things have to be tolerated that under other circumstances would be abated, the necessity for their existence outweighing the ill results that proceed therefrom. Therefore, as to business which is lawful and reasonable and is not of itself a nuisance when properly conducted, which is carried on upon one's own premises, invading no right of a neighbor, is not such a nuisance as the law will afford redress, even though it produces an inconvenience and annoyance, unless such inconvenience and annoyance is the result of negligence and carelessness; but where the business is of that character as to become a common nuisance, the damages may be recovered even though no negligence is shown. Rockwood v. Wilson, 11 Cushing, 221–226.

The distinction between the two cases is that in the former the business is not of that nature as to injuriously affect others, but may become so by the negligent manner in which it is carried on; whilst in the latter case the nature of the business is such as must necessarily be injurious, even though managed with the greatest care and skill. Wood's Law of Nuisances (2d ed.) sec. 127.

Again, there is another class of cases in which the question of

negligence is material, as, for instance, where the legislature has authorized the doing of that which would otherwise be a nuisance. In such cases the person is shielded from liability for damages that ensue, unless he is chargeable with negligence for the manner in which the act was done. Radcliff v. Mayor, Etc., 4 N. Y. 195; Bellinger v. N. Y. C. R. R. Co., 23 id. 42; Kellinger v. F. S. S. & G. S. F. R. R. Co., 50 id. 206–212; Uline v. N. Y. C. & H. R. R. R. Co., 101 id. 98–107; Conklin v. N. Y., O. & W. R. Co., 102 id. 107; Ottenot v. N. Y., L. & W. R. Co., 28 N. Y. S. R. 483. As, for instance, a person may be annoyed and inconvenienced by the noise and tread of passing railway trains, and yet where the railroad is lawfully built, and is managed with proper care and skill, it is not a nuisance, even though it passes near to a dwelling-house and materially disturbs the quiet and slumber of the occupants. Beseman v. P. R. R. Co., 50 N. J. L. 235. But the authority of the legislature should doubtless be express, Cogswell v. N. Y., N. H. & H. R. R. Co., 103 N. Y. 10, and relate to matters of public utility in which the people have an interest and the right of control. B. & P. R. R. Co. v. Fifth Baptist Church, 108 U. S. 317–332.

We are thus brought back to the question as to whether the business of manufacturing gas by the defendant is in and of itself a nuisance. * * * It is undoubtedly true that in the manufacture of gas the escape of some is unavoidable, and it may inconvenience those who live in the immediate vicinity of the works, but the necessities of people living in large cities and villages imposes some inconvenience to others, and has compelled recognition of the principle that each member of society must submit to annoyances consequent upon the use of property, provided such use is reasonable as respects the owner and those immediately affected in view of time, place and other circumstances. St. Helens Smelting Co. v. Tipping, 11 H. L. Cas. 642–64 id. Cooley on Torts, 598–601.

We are aware that a different view has been expressed in reference to gas works. Carhart v. A. G. L. Co., 22 Barb. 297–312. But, notwithstanding this, our conclusions are that, in view of the circumstances, the public character and utility, the business is lawful, authorized by the legislature and that it is not a nuisance if properly conducted. It may, however, be carried on in such a manner as to unnecessarily affect and injure others, in which case it would become a nuisance. If we are correct in this view the question of negligence was involved in the case and should have been submitted to the jury.

As we have seen, time, place and circumstances have an important bearing upon the question. A person may negligently select an improper place for the establishment of his business. That which would be proper and tolerated in one locality would not be in another. Negligence may also exist in the construction as well as in the management and operation. Each person should conduct his business with the best approved apparatus, with such skill and care as experienced and prudent persons may possess, in order that he may do his neighbor as little harm as possible. People v. Sands, 1 Johns. 78–88.

We do not understand it to be claimed that the defendant was guilty of maintaining a public nuisance, or that it is chargeable with any fault or negligence in the selection of the locality in which it erected its works. It is claimed that they were constructed of the best material according to the best known plan, and operated with the highest degree of skill and care. For twenty years they were operated without complaint. The plaintiff, subsequent to the location of the defendant, purchased the adjoining property and took up her residence thereon. It is true that she claimed to be affected from the odors that came from the naphtha tank constructed near her premises, and that was constructed after she became a resident there. It is possible that the defendant negligently located its tank in an improper place, but that question was not submitted to the jury. Neither was the question as to whether the odors proceeding from this tank produced the nuisance. The question submitted was as to whether the odors proceeding from the entire gas works constituted a nuisance. It was also true that there was also some evidence tending to show that the plaintiff's health had been affected. She testified that on some occasions she had been affected with nausea, but the question as to whether the works affected the health of the public or of the plaintiff was not submitted. On the contrary, it was expressly taken from the jury by the instruction to which the exception was taken, in which the court stated that it would be a nuisance "whether it affected the health of the plaintiff and her family or not." * * * The defendant's business is of a public nature and utility. If it is a nuisance *per se*, and without the protection of the statute, an individual may procure it to be enjoined and thus drive it from place to place whilst another individual, living upon the line of its mains, may compel the company, by mandamus, to proceed with its business and supply his residence with illuminating

gas, thus producing a condition in which the company would be liable if it did, and would also be liable if it did not.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

Judgment affirmed.[1]

All concur with BROWN, J., except FOLLETT, Ch. J., and HAIGHT, J., dissenting.

ROGERS v. ELLIOTT.

(146 Mass. 846.—1888.)

KNOWLTON, J. The defendant was the custodian and authorized manager of property of the Roman Catholic Church, used for religious worship. The acts for which the plaintiff seeks to hold him responsible were done in the use of this property, and the sole question before us is whether or not that use was unlawful. The plaintiff's case rests upon the proposition that the ringing of the bell was a nuisance. The consideration of this proposition involves an inquiry into what the defendant could properly do in the use of the real estate which he had in charge, and what was the standard by which his rights were to be measured.

It appears that the church was built upon a public street in a thickly settled part of the town, and if the ringing of the bell on Sundays had materially affected the health or comfort of all in the

[1] In Norcross v. Thoms, 51 Me. 503, the court held that a jury might infer a nuisance from evidence that a blacksmith shop was so placed and used as to inconvenience another. The court said, "The only accurate method of ascertaining the meaning of the term nuisance at common law is to examine decided cases adjudged to be, or not to be nuisances." In Campbell v. Seaman, 63 N. Y. 568, defendant's brickyard produced occasional injury to plaintiffs' ornamental shrubs and trees, and was used before plaintiffs bought their lands and beautified them, yet plaintiffs had an injunction. In Davis v. Rich, 180 Mass. 235, 62 N. E. 375, (1902); "The defendant asked for a ruling that the defendant was 'not liable unless he failed to exercise that degree of care in originally and subsequently maintaining the gutter and conductor which every person of common prudence and caution ordinarily takes of his own concerns.' As to this it is enough to say that if the defendant knew that his gutter or spout created a nuisance, he was absolutely answerable for the harm it did until he stopped it. Lion v. Railway Co., 90 Md. 266, 44 Atl. 1045, 47 R. A. 127; Ball v. Nye, 99 Mass. 582, 97 Am. Dec. 56. See City of Holyoke v. Hadley Water Power Co., 174 Mass. 424, 54 N. E. 889."

The standard to be used in judging whether the use of a thing is a nuisance is not the effect upon one of peculiar sensibilities, but the effect of such use upon the comfort of ordinary persons in the vicinity.

vicinity, whether residing or passing there, this use of the property would have been a public nuisance, for which there would have been a remedy by indictment. Individuals suffering from it in their persons or their property could have recovered damages for a private nuisance. Wesson v. Washburn Iron Co., 13 Allen, 95.

In an action of this kind, a fundamental question is, by what standard, as against the interests of a neighbor, is one's right to use his real estate to be measured. In densely populated communities the use of property in many ways which are legitimate and proper, necessarily affects in greater or less degree the property or persons of others in the vicinity. In such cases the inquiry always is, when rights are called in question, what is reasonable under the circumstances. If a use of property is objectionable solely on account of the noise which it makes, it is a nuisance, if at all, by reason of its effect upon the health or comfort of those who are within hearing. The right to make a noise for a proper purpose must be measured in reference to the degree of annoyance which others may reasonably be required to submit to. In connection with the importance of the business from which it proceeds, that must be determined by the effect of the noise upon people generally, and not upon those, on the one hand, who are peculiarly susceptible to it, or those, on the other, who by long experience have learned to endure it without inconvenience; not upon those whose strong nerves and robust health enable them to endure the greatest disturbances without suffering, nor upon those whose mental or physical condition makes them painfully sensitive to everything about them.

That this must be the rule in regard to public nuisances is obvious. It is the rule as well, and for reasons nearly if not quite as satisfactory, in relation to private nuisances. Upon a question whether one can lawfully ring his factory bell, or run his noisy machinery, or whether the noise will be a private nuisance to the occupant of a house near by, it is necessary to ascertain the natural and probable effect of the sound upon ordinary persons in that house, not how it will affect a particular person who happens to be there to-day, or who may chance to come to-morrow. Fay v. Whitman, 100 Mass. 76; Davis v. Sawyer, 133 Mass. 289; Walter v. Selfe, 4 DeG. & Sm. 315, 323; Soltau v. DeHeld, 2 Sim. (N. S.) 133; St. Helens Smelting Co. v. Tipping, 11 H. L. Cas. 642.

In Walter v. Selfe, Vice-Chancellor KNIGHT BRUCE, after elaborating his statement of the rule, concludes as follows: "They have, I

think, established that the defendant's intended proceeding will, if prosecuted, abridge and diminish seriously and materially the ordinary comfort of existence to the occupiers and inmates of the plaintiff's house, whatever their rank or station, whatever their age, or whatever their state of health."

It is said by Lord ROMILLY, Master of the Rolls, in Crump v. Lambert, L. R. 3 Eq. 409, that "the real question in all the cases is the question of fact, viz., whether the annoyance is such as materially to interfere with the ordinary comfort of human existence." In the opinion in Sparhawk v. Union Passenger Railway, 54 Penn. St. 401, these words are used: "It seems to me that the rule expressed in the cases referred to is the only true one in judging of injury from alleged nuisances, viz., such as naturally and necessarily result to all alike who come within their influence." In the case of Westcott v. Middleton, 16 Stew. (N. J.) 478, it appeared that the defendant carried on the business of an undertaker, and the windows of the plaintiff's house looked out upon his yard, where boxes which had been used to preserve the bodies of the dead were frequently washed, and where other objects were visible and other work was going on, which affected the tender sensibilities of the plaintiff, and caused him great discomfort. Vice-Chancellor BIRD, in dismissing the bill for an injunction against carrying on the business there, said: "The inquiry inevitably arises, if a decision is rendered in Mr. Westcott's favor, because he is so morally and mentally constituted that the particular business complained of is an offense or a nuisance to him, or destructive to his comfort or his enjoyment of his home, how many other cases will arise and claim the benefit of the same principle, however different the facts may be, or whatever may be the mental condition of the party complaining. * * * A wide range has indeed been given to courts of equity in dealing with these matters; but I can find no case where the court has extended aid unless the act complained of was, as I have above said, of a nature to affect all reasonable persons, similarly situated, alike."

If one's right to use his property were to depend upon the effect of the use upon a person of peculiar temperament or disposition, or upon one suffering from an uncommon disease, the standard for measuring it would be so uncertain and fluctuating as to paralyze industrial enterprises. The owner of a factory containing noisy machinery, with dwelling houses all about it, might find his business

lawful as to all but one of the tenants of the houses, and as to that one, who dwelt no nearer than the others, it might be a nuisance. The character of his business might change from legal to illegal, or illegal to legal, with every change of tenants of an adjacent estate; or with an arrival or departure of a guest or boarder at a house near by; or even with the wakefulness or the tranquil repose of an invalid neighbor on a particular night. Legal rights to the use of property cannot be left to such uncertainty. When an act is of such a nature as to extend its influence to those in the vicinity, and its legal quality depends upon the effect of that influence, it is as important that the rightfulness of it should be tried by the experience of ordinary people, as it is in determining a question as to negligence, that the test should be the common care of persons of ordinary prudence, without regard to the peculiarities of him whose conduct is on trial.

In the case at bar it is not contended that the ringing of the bell for church services in the manner shown by the evidence materially affected the health or comfort of ordinary people in the vicinity, but the plaintiff's claim rests upon the injury done him on account of his peculiar condition. However this request should have been treated by the defendant upon considerations of humanity, we think he could not put himself in a place of exposure to noise, and demand as of legal right that the bell should not be used.

The plaintiff in his brief concedes that there was no evidence of express malice on the part of the defendant, but contends that malice was implied in his acts. In the absence of evidence that he acted wantonly, or with express malice, this implication could not come from his exercise of his legal rights. How far and under what circumstances malice may be material in cases of this kind, it is unnecessary to consider.

Judgment on the verdict.[1]

[1] In Lane v. City of Concord, 70 N. H. 485, 49 At. 687 (1900), it is said: "Nevertheless, we think it may be stated as a general doctrine that, in order to constitute a nuisance from the use of one's property, the use must be such as to produce a tangible and appreciable injury to neighboring property, or such as to render its enjoyment specially uncomfortable and inconvenient. See Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567, 572; Sparhawk v. Railway Co., 54 Pa. 401; Rhodes v. Dunbar, 57 Pa. 274, 98 Am. Dec. 221; Wahle v. Reinbach, 76 Ill. 322; Barnes v. Hathorn, 54 Me. 124; Coke Co. v. Freeland, 12 Ohio St. 392; Smelting Co. v. Tipping, 11 H. L. Cas. 642; Salvin v. Coal Co., 9 Ch. App. 705. In this view of the law, as well as of the use to which the lot was sub-

§ 2.—PUBLIC NUISANCE.

KNOWLES v. PENNSYLVANIA R. CO.

A private action for public nuisance.

(175 Pa. 623; 34 At. 974.—1896.)

MCCOLLUM, J. The defendant company contends that, if the plaintiff has sustained any damage by reason of its erection and maintenance of the fence across Tacony road, he must "have recourse to the city for compensation" for it. This contention appears to be based on the theory that the obstruction complained of was incident to the work of raising its roadbed to conform to the revision of grades authorized by the ordinance of March 31, 1887, and that, for damage done in the proper performance of such work, the company is not responsible. But it is obvious that the question whether the company or city is liable for the damage caused by the company's elevation of its roadbed in accordance with the revision of grades is not in this case. The fence was erected by the company across Tacony road on the 14th of December, 1891, and it was maintained there until the latter part of October, 1893, when the company removed it, and for five months thereafter the public used the highway as it had done before the erection of the fence. The work of elevating the company's roadbed at the point where the same was crossed by the Tacony road was not begun until April, 1894, two years and three months after the erection of the fence. It is obvious, therefore, that the obstruction complained of in this case had no connection with the revision of grades or the elevation of the roadbed.

jected by the defendants, and the occasion for such use, we are of opinion that the jury were properly instructed that the unsightly appearance of the lot was not a cause entitling the plaintiff to damages, and that, unless she was injured by gases or something else coming from the city lot onto her premises, she had no right to complain. Unless 'gases or something else' did come upon her land from that lot, it is not perceived how she could have suffered any legal injury from the substances deposited thereon, for it is apparently well settled that the unsightly condition of one's premises does not of itself afford a right of action to a more æsthetic adjoining owner. Wood, Nuis. (2d Ed.) 4–6, 15, 16, and authorities cited. Persons living in cities or other thickly settled communities must necessarily suffer some discomforts and annoyances from each other, but for these they are supposed to be fully compensated by the advantages incident to such communities. Exceptions overruled."

Public nuisance is not a ground for civil action by an individual unless he has suffered some damage not [illegible] in common with [illegible].

The important question in the case is whether the plaintiff has sustained such loss or damage in consequence of the obstruction of the highway as will support his action against the wrongdoer. The business of the plaintiff was excavating and hauling dirt and stone for grading and building purposes. At the time the fence was erected across Tacony road, he had contracts with different parties for hauling at least 5,000 loads of dirt from the high ground on the west side of the railroad to fill up and grade the lots on the low ground on the east side of it and was actually engaged in hauling the same. He was to receive, under his contracts, 15 cents a load for hauling it. The natural route from the place where the dirt was taken to the place of deposit was over the Tacony road. At least three loads of dirt could be delivered over this route in the time required to deliver one load over the route the plaintiff was compelled to take after the fence was erected. It was worth 40 cents to deliver a load over the latter route, while 15 cents was sufficient compensation for delivering a load over the former. It is clear, therefore, that the plaintiff suffered material loss or damage by reason of the obstruction which was the original subject of complaint in this action. * * * *

It is not possible to reconcile all the cases in which the question whether a private action is maintainable for a loss occasioned by a public nuisance has been considered and passed upon. In England, as well as in our own country, the decisions on this point are conflicting. The loss or damage which is adjudged in some cases to be special, and to authorize a suit by the injured party against the wrongdoer, is held in other cases to furnish no basis for a private action. But a review or extended reference to the decisions of the courts of other states or of England is not deemed necessary, because the case in hand must be determined in accordance with our own adjudications, and those, we think, fully sustain the ruling of the learned court below, and the judgment based thereon. In Hughes v. Heiser, 1 Bin. 463, the plaintiff declared that he had prepared rafts with intent to navigate them down a river which was a public highway, and that he did navigate them until he came to a dam erected by the defendant, by which he was prevented from passing down the river with his rafts. It was held that special damage was shown, and his action for it was sustained. To the same effect is Powers v. Irish, 23 Mich. 429. In Dudley v. Kennedy, 63 Me. 465, "being prevented from fulfilling a transportation contract because of an

obstruction of a navigable river by a boom was deemed sufficient special damage" to support the suit. In Mayor, etc., of Pittsburg v. Scott, 1 Pa. St. 309, Duquesne way was obstructed by the defendant, and the plaintiff (the city of Pittsburg) claimed, *inter alia*, that it was obliged, by reason of the obstruction, to haul by a circuitous route the stones, dirt, and other material required in repairing the public wharf along Allegheny river, between said way and said river. The plaintiff also claimed that its revenue from the wharf was greatly diminished by the obstruction, and that the defendant prevented its wharf master from collecting tolls. It was held that the action was maintainable on either ground. It was also held that it was immaterial, so far as the right of action was concerned, whether there was a total or partial obstruction of the way. Mayor, etc., of Pittsburg v. Scott was approved and followed in Brown v. Watson, 47 Me. 161, and cited, with Hughes v. Heiser by SHARSWOOD, J., in his opinion in Canal Co. v. Graham, 63 Pa. St. 290.

No decision of this court has been brought to our notice which overrules or qualifies either of the Pennsylvania cases we have cited as applicable to the case in hand.

CRAWFORD v. TYRRELL.

(128 N. Y. 341.—1891.)

GRAY, J. In this action, which was brought to restrain the defendant from keeping a house of ill fame and from using his premises as an assignation house, and to recover damages for injuries sustained, the trial court found as facts that the house, as maintained by defendant, was a resort for prostitutes and licentious men, and that the persons occupying rooms acted in a boisterous and noisy manner, and indecently exposed their persons at the windows, "whereby the use and occupation of the plaintiff's premises had been interfered with and rendered uncomfortable, and whereby the occupants of the plaintiff's premises have been annoyed and seriously disturbed." Such a finding was amply justified by the evidence, and, indeed, it is not discussed by the appellant; but he argues that the plaintiffs could not maintain a civil action of this nature, inasmuch as the damage they suffered was a damage common to the

whole community, and not special to them. If that position had been sustained by the facts, I do not doubt but that it would have been the duty of the trial judge to have denied the relief prayed for. The rule of law requires of him who complains of his neighbor's use of his property, and seeks for redress and to restrain him from such use, that he should show that a substantive injury to property is committed. The mere fact of a business being carried on which may be shown to be immoral, and, therefore, prejudicial to the character of the neighborhood, furnishes of itself no ground for equitable interference at the suit of a private person; and, though the use of property may be unlawful or unreasonable, unless special damage can be shown, a neighboring property owner cannot base thereupon any private right of action. It is for the public authorities, acting in the common interest, to interfere for the suppression of the common nuisance. See Francis v. Schoellkopf, 53 N. Y. 152. If the business complained of is a lawful one, the legal question presented in a civil action for private damage is whether the business is reasonably conducted, and whether, as conducted, it is one which is obnoxious and hurtful to adjoining property. If the business is unlawful, the complainant in a private action must show special damage, by which the legitimate use of his adjoining property has been interfered with, or its occupation rendered unfit or uncomfortable. That the perpetrator of the nuisance is amenable to the provisions and penalties of the criminal law is not an answer to an action against him by a private person to recover for injuries sustained, and for an injunction against the continued use of his premises in a similar manner. The principle has been long settled that the objection that the nuisance was a common one is not available if it be shown that special damage was suffered. Rose v. Miles, 5 Maule & S. 101; Rose v. Groves, 5 Man. & G. 613; Francis v. Schoellkopf, *supra;* Lansing v. Smith, 4 Wend. 9. One who uses his property lawfully and reasonably, in a general legal sense, can do injury to nobody. In the full enjoyment of his legal rights in and to his property the law will not suffer a man to be restrained, but his use of the property must be always such as in no manner to invade the legal rights of his neighbor. The rights of each to the enjoyment and use of their several properties should, in legal contemplation, always be equal. If the balance is destroyed by the act of one, the law gives a remedy in damages, or equity will restrain. If the use of a property is one which renders a neighbor's occupation and enjoyment

physically uncomfortable, or which may be hurtful to the health, as where trades are conducted which are offensive by reason of odors, noises, or other injurious or annoying features, a private nuisance is deemed to be established, against which the protection of a court of equity power may be invoked. In the present case the indecent conduct of the occupants of the defendant's house, and the noise therefrom, inasmuch as they rendered the plaintiff's house unfit for comfortable or respectable occupation, and unfit for the purposes it was intended for, were facts which constituted a nuisance, and were sufficient grounds for the maintenance of the action.

If it was a nuisance which affected the general neighborhood, and was the subject of an indictment for its unlawful and immoral features, the plaintiffs were none the less entitled to their action for any injury sustained, and to their equitable right to have its continuance restrained.

The judgment appealed from should be affirmed, with costs.

plt's is limited to damages already sustained, & may bring another suit for subsequent repetition of the nuisance.

§ 3.—PARTIES TO NUISANCE ACTIONS.

BLY v. EDISON ELECTRIC ILLUM. CO.

(172 N. Y. 1; 64 N. E. 745.—1902.)

WERNER, J. The principal question presented on this appeal is whether a tenant in possession of premises affected by a nuisance, under a lease made during the existence of the nuisance, can maintain an action to abate the same, and to recover his damages occasioned thereby. * * * Several propositions seem to be quite satisfactorily established, therefore, both upon principle and by authority: (1) That an owner of property affected by a nuisance may maintain an action to recover his damages or to abate the nuisance, or both, no matter whether he takes his title before or after the introduction of the nuisance; (2) that a landlord and his tenant have separate estates for injuries, to which each may have his appropriate remedy. If, then, an owner who "comes to a nuisance" can maintain an action to redress his wrongs, why

should a tenant who "comes to a nuisance" be denied any remedy? The last owner or occupant, when he acquires his property or possession, acquires with it all the rights which by law belong to it, and exemption from wrongful injury by a contiguous proprietor is one of them. A man may, by an uninterrupted user of 20 years, acquire, as against individuals, rights which he cannot acquire against the public. He may, as against individuals, acquire during that period of time a right to use the air, the earth, or the water in a manner which without such long use would be inconsistent with the rights of his neighbors, and subject to immediate correction by process of law. By the kindly aid of a legal fiction, a grant will be presumed, after so great a lapse of time, from all who had any right to challenge his proceedings. But no user for any shorter period will give him more right against a new comer than he had against an old one. The substance of this doctrine was distinctly held in Howell v. McCoy, 3 Rawle, 256, where the defendant's lease was six years older than the plaintiff's; in Bliss v. Hall, 4 Bing. N. C. 183, where defendant, a tallow chandler, pleaded the priority of his business, and where the plea was met by the court's suggestion that "the plaintiff came to the house he occupies with all the rights which the common law affords, and one of them is the right to wholesome air;" in Elliotson v. Feetham, 2 Bing. N. C. 134, where a noisy nuisance, which was ten years older than the plaintiff's term, was still held to be a nuisance. The same rule has been applied in favor of subsequent purchasers in a number of English cases above cited, and in Brady v. Weeks, 3 Barb. 157; Blunt v. Aikin, 15 Wend. 526, 30 Am. Dec. 72; Vedder v. Vedder, 1 Denio, 257; Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567. In Smith v. Phillips, 8 Phila. 10,—a district court case, but an extremely well considered one, and cited by Wood in his work on Nuisances,—the plaintiff, a truck gardener, was a tenant from year to year. He had paid the same annual rent for 33 years. The defendant erected chemical works near his premises, and the smoke and vapors therefrom injured the plaintiff's crops. In the action brought by the tenant, the defendant insisted that there could be no recovery, because by renewing the lease after the erection of the nuisance the plaintiff had voluntarily placed himself in a position where he could be injured, and the fact that he paid the same rent with the nuisance that he did before it existed was a virtual admission on his part that no serious injury resulted therefrom. The court rejected the argument, and held that no such presumption

could be raised from the facts, and that the plaintiff was entitled to recover, the same as though he were an owner in fee or a tenant for a term of years. The learned judge who wrote the opinion in that case summed up the whole law of the matter in the following paragraph:

"It would be a mischievous doctrine to hold that a new purchaser or a new lessee is not to be protected against an existing nuisance. Such a doctrine would soon make a person who erects a nuisance the master of all owners or lessees who surround him, for, if owners, they could not sell to a purchaser or let to a new tenant without great loss to their property; and, if lessees, they could not assign their terms or underlet without suffering a similar loss. They might themselves maintain actions for the nuisance, but a suit at law would be a poor equivalent for the diminished value of their estates. Their children, too, upon whom their estates would devolve by descent or will, would be without remedy for their ruined inheritance. The application of such a rule would operate as a kind of pre-emption law in favor of wrong-doers, and cause a gradual confiscation of adjacent estates for their benefit." In commenting upon this case, WOOD says: "The doctrine of this case is important, and it certainly is predicated upon sound public policy and good common sense. The idea that a wrong-doer can set up, by way of defense, in an action for damages resulting from his wrongful act, the fact that the plaintiff has not seen fit to be driven away from the premises or to demand a reduction in the rent is, to say the least, somewhat audacious, if not preposterous." Wood, Nuis. p. 777, § 575.

It is apparent that the rule in Kernochan's Case, 128 N. Y. 568, would be an extremely convenient one in all cases, and probably a just one in many cases arising out of nuisances; but we think it cannot be adopted as a general rule applicable to the law of nuisances without overturning the fundamental principles upon which that law is based. If an ordinary nuisance is to be hallowed by the presumption of permanence, we may well pause to inquire, whither are we drifting? This inquiry is as pertinent in the case at bar, where the nuisance is created in the processes of a work of great public utility, as it would be in a case where the nuisance is not sought to be cloaked beneath the plea of "*pro bono publico.*" If there is a nuisance, there is a wrong, which the court will neither shield by presumption, nor encourage with its protection. We conclude, there-

fore, that the doctrine of Kernochan's Case was not intended to be applied to the general law of nuisances, but to a condition created by the construction and operation of the elevated railroads, which has no exact parallel in any other department of our jurisprudence. This, of course, leads to the further conclusion that the modification of the judgment herein as to damages, upon the authority of the Kernochan Case, was erroneous; and this would require a reversal of the judgment of the Appellate Division, and an affirmance of the judgment entered upon the decree of the trial court, but for an oversight of the latter court as to the period for which the plaintiff was entitled to recover damages. It is familiar law that the damages which may be recovered in an action of this character are limited to the period of six years immediately preceding the commencement of the action Code Civ. Proc. § 382; In re Neilley, 95 N. Y. 382; Roberts v. Ely, 113 N. Y. 128, 20 N. E. 606; Butler v. Johnson, 111 N. Y. 204, 18 N. E. 643; Colrick v. Swinburne, 105 N. Y. 503, 12 N. E. 427. The six years statute of limitations was pleaded by the defendant. The action was commenced on the 3d day of December, 1898. Plaintiff's allegations and proofs as to damages cover the whole period from June, 1886, to the commencement of the action. The judgment contains no limitation as to the period for which damages were awarded. Presumptively, they were intended to cover all the loss suffered by the plaintiff. This omission to limit plaintiff's right of recovery to the period of six years immediately preceding the commencement of the action presents error which requires a new trial, and renders it unnecessary to examine or discuss the other assignments of error relied upon by the defendant to secure a new trial in the event of a reversal of the judgment herein. Nor need the question of damages be discussed at this time, for it must be evident, in spite of what has been said about the relative rights of owner and tenant, that unless the plaintiff can show that she has suffered some loss which is distinctly her own, there can be no basis for a recovery by her.

The judgment herein should be reversed and a new trial had, with costs to abide the event. HAIGHT, J., *and* PARKER, C. J., *dissented.*

All persons whatever their legal relations be, who co-operate in causing or in continuing a nuisance, may be sued jointly therefor.

SIMMONS v. EVERSON.

(124 N. Y. 319.—1891.)

The trial court found that for many years prior to October 18, 1887, the appellants owned in severalty three lots, each being twenty-two feet wide, and bounded on the east by the center line of South Salina street, in the city of Syracuse. The south lot was owned by the defendant Lynch, the middle by the defendant Pierce and the north one by the defendant Everson. On these lots stood three brick stores, separated from each other by brick partition walls extending from the foundation to the roofs. A continuous brick wall of uniform height (about 60 feet) and thickness, stood adjacent to the west line of the street and formed the front of the buildings. The partition walls and the front wall were interlocked or built together.

On the date mentioned the three stores were substantially destroyed by fire, nothing being left standing except the front wall, a part of the partition walls and a small part of the wood work in the front of Everson's building. Shortly after this event the front wall began to lean towards the street, and continued to incline more and more in that direction until November 17, 1887, when it gave way near the point where it was united with the partition wall between the buildings of Lynch and Pierce, carrying down the entire front and part of both partition walls, material from the part of the front wall standing on the lots of Everson and Pierce, and from their partition wall, fell on and killed the plaintiff's intestate, who was lawfully on the sidewalk near the boundary between their properties. No part of the walls on Lynch's lot fell on the decedent. It was found that immediately after the fire the front and part of the petition walls became weak, unsafe, dangerous and liable to fall into the street, and that each of the defendants was careless and negligent in not removing or supporting the walls on his own lot. and that the several neglects of the defendants united and directly caused the walls to fall. It was further found that these walls were so unsafe that they were a public nuisance, and also that the decedent did not negligently contribute to the accident or to his own death. The damages were assessed at $5,000.

FOLLETT, Ch. J. It is urged, in behalf of the defendants, that at most this is but a case of several independent acts of negligence committed by each, the joint effect of which caused the accident, and for which they are not jointly liable within the rule laid down in Chipman v. Palmer, 77 N. Y. 51.

The case at bar does not belong to the class of actions arising out of acts or omissions which are simply negligent, and while the defendants did not intend by their several acts to commit the injury, their conduct created a public nuisance which is an indictable misdemeanor under the statutes of this State, Penal Code, secs. 385, 387; Vincett v. Cook, 4 Hun, 318 and at common law. Regina. v. Watts, 1 Salk. 357; S. C. 2 Ld. Raym. 856; 1 Russ. Cr. (5th ed.) 423; 2 Whar. Cr. Law, sec. 1410; Big. Torts, 237; Pol. Torts (2d ed.) 345; Stephen's Dig. Cr. Law, art. 176; Indian P. C. sec. 268. Persons who by their several acts or omissions maintain a public or common nuisance, are jointly and severally liable for such damages as are the direct, immediate and probable consequence of it. Irving v. Wood, 51 N. Y. 224, 230; Slater v. Merserеau, 64 id. 138; Timlin v. Standard Oil Co., 54 Hun, 44; Klauder v. McGrath, 35 Penn. St. 128; 1 Shear. & R. Neg. (4th ed.) sec. 122; Pol. Tort (2d. ed.) 356.

The fall of these four-story brick walls into the street, was the direct and immediate consequence of the several acts of the defendants in suffering the portions standing on their own lots to remain unsupported after they had visibly begun to incline towards the street, and it was as obvious before as it was after the accident that if any part of the front wall fell, a large part of it must, and that it would go into the street.

The judgment should be affirmed, with costs.[1]

[1] In Patterson v. Jos. Schlitz Brewing Co., 16 S. D.—, 91 N. W. 336 (1902), it is said: "With reference to the liability of the owner for injuries to persons caused by defective and unsafe buildings, the following rule may be regarded as settled: If when let the premises are in a condition dangerous to the public, or with a nuisance thereon, the owner may be liable to strangers for the injuries resulting from such condition or nuisance if he had notice of the dangerous condition of the building, or could, by the exercise of ordinary care and diligence, have ascertained its dangerous condition. By renting the premises and receiving rent therefor he is to be regarded as authorizing the continuance of the nuisance. See Schwalbach v. Shinkle, Wilson & Kreis Co. (C. C.) 97 Fed. 483."

GALLAGHER v. KEMMERER.

(144 Pa. St. 509.—1991.)

CLARK, J. This action of trespass on the case was brought by Bernard Gallagher, to recover damages for injuries to his land from a deposit of mine water, culm, and dirt, accumulated thereon from the defendants' mining operations on Sandy Run creek, in Luzerne County. The creek has its source in the mountains, about four or five miles above Gallagher's land, through which it passes. The defendants' operations were commenced in the year 1877. The plaintiff alleges that in the process of washing their coal the refuse, culm, and dirt were conducted in chutes, which emptied the dirt into the creek, and by the waters of the creek were carried to and thrown upon his meadow land, covering 20 acres or more, and rendering the land barren and wholly unproductive. It appears, however, that the Highland Coal Company, operated by Markle & Co., had been mining coal several miles above on the same stream from 1864, and that that company has ever since been so engaged continuously to the bringing of this suit. The plaintiff alleges that the culm and dirt from both these mines could, at a moderate and reasonable expense, have been banked, and if this had been done no appreciable injury would have resulted; and, further, that the Highland Coal Company, to some extent at least, pursued this plan, but the defendant company dumped the refuse of their mines directly into the stream. In August, 1884, Bernard Gallagher, in consideration of the sum of $400, by formal writing under seal, released the Highland Coal Company from all claims and demands for damages, and from compensation for injuries then or thereafter done to his property, either from the pollution of the stream, or from the deposit of refuse matter upon his lands by that company. It may be fairly inferred from this that the Highland Coal Company did, in some degree, contribute to the injuries of which the plaintiff complains. At the trial, the defendant presented a point for instruction to the jury, as follows: "That as it appears from the evidence that the plaintiff settled with Markle & Co. for damages sustained by him for the fouling of Sandy Run, and the deposit of culm on his land by them, and it being impossible, under the evidence, to separate it, and ascertain the proportion of the damage caused by them

and by the defendants, it having been occasioned by simultaneous and contemporaneous acts, the settlement must be regarded as an accord and satisfaction for the whole damage, and the plaintiff cannot recover in this action." This point was negatived, and that is the first error assigned. It is argued, on the part of the appellants, that the injury to which the plaintiff was subjected was of such a character that it could not, as between the parties who caused it, be divided, so as to determine in what proportion it was caused by each; and that, even if the defendant's mines had not been operated, the mining operations of the Highland Coal Company would have resulted in the same injury. It is true that the injury complained of may have been caused in part by the operations of the Highland Coal Company, conducted contemporaneously with the operations of the defendants' mines, and that it would be difficult, if not quite impossible, to separate and ascertain, definitely or certainly, the proportion of the whole damage done by each of these operations, respectively. But these several operations were entirely independent of each other. They were several miles apart, and the ownership, management, and control were wholly distinct and separate. There was no concert of action, or common purpose or design, which would support the theory of joint injury. The case, in this branch, is ruled by Little Schuylkill Co. v. Richards, 57 Pa. St. 142. In that case, the milldam was filled by deposits of coal dirt from different mines. The court below charged the jury that if, at the time the defendants were throwing dirt into the river, the same thing was being done by other collieries, and the defendants knew it, they were liable for the combined result. This instruction was held to be erroneous. "The ground of action," it was there said, "is not the deposit of the dirt in the dam, but the negligent act above. The defendants' liability therefore began with the act on their own land, and they were responsible for the consequences; and, as the negligent act was separate and independent of the acts of the other miners, it was several when committed, and did not become joint, because the general consequences were united." "Without concert of action," said this court in the case cited, "no joint suit could be brought against the owners of all the collieries, and clearly this must be the test; for if the defendants can be held liable for the acts of all the others, so each and every other owner can be made liable for all the rest, and the action must be joint and several. But the moment we should find them jointly sued, then

the want of concert and the several liability of each would be apparent. These principles are fully sustained by the following cases: Russell v. Tomlinson, 2 Conn. 206; Adams v. Hall, 2 Vt. 9; Van Steenburgh v. Tobias, 17 Wend. 562; Buddington v. Shearer, 20 Pick. 477; Auchmuty v. Haam, 1 Denio, 495; Partenheimer v. Van Order, 20 Barb. 479." Unless the negligence of two persons is joint and concurrent, each is liable for his own negligence only. Boyd v. Insurance Patrol, 113 Pa. St. 269. To the same effect are the cases of Seely v. Alden, 61 Pa. St. 306; Leidig v. Bucher, 74 Pa. St. 67; and Little Schuylkill Co. v. French, *81 Pa. St. 366. It is a matter of no consequence whatever that the stream was not a public highway; that fact could not in any way affect the principle referred to; and, if the Highland Coal Company was not a joint tort-feasor, it is immaterial in what form the release was effected, whether by deed or otherwise.

The judgment was reversed on another ground.

It is no defense for one who is guilty of nuisance that others have been similarly guilty.

BEACH v. STERLING IRON & ZINC CO.

(54 N. J. Eq. 65: 33 At. 286.—1895.)

PITNEY, V. C. * * * Equally untenable is another position advanced by the defendant, viz. that the river was always more or less polluted by contributions from other mines, and from the washing of plowed fields, public roads, and railroad embankments. Such insistments have been frequently made, and always overruled. The question in such cases seems to be whether the stream has already become so far polluted by contributors who have acquired a right so to do, by adverse use or otherwise, as that the pollution presently opposed will not sensibly alter its condition; and even in such a case the courts have held that the party has the right to deal with each contributor in detail, and to buy off such contributors as have acquired a right, and is not obliged to submit to fresh contributions. I cite the following authorities: Ross v. Butler, 19 N. J. Eq. 294, at page 306, and Attorney General v. Steward, 20 N. J. Eq. 415, at page 419, where the learned chancellor says: "The defendants have no right to pollute or corrupt the waters of the creek, or if they are already partially polluted, to render them

more so;" and to Cleveland v. Gas Light Co., 20 N. J. Eq. 201, at page 208, and Meigs v. Lister, 23 N. J. Eq. 199, at page 205, where the learned Chancellor says: "The position taken by counsel that the complainants were entitled to no relief from this nuisance, because the locality was surrounded by other nuisances, and dedicated to such purposes, has no foundation in law or in fact. If there were several nuisances of the like nature surrounding them, they must seek relief from each separately; they cannot be joined in one suit, nor need the suits proceed *pari passu*." Crossley v. Lightowler (1867) 2 Ch. App. 478, at page 481, where Lord CHELMSFORD says: "But the defendants contend that the plaintiffs have no right to complain of any pollution of the Hebble occasioned by them, because there are many other manufacturers who pour polluting matter into the stream above the plaintiffs' works, so that they never could have the water in a fit state for use, even if the defendants altogether ceased to foul it. The case of Smelting Co. v. Tipping, 11 H. L. Cas. 642, 11 Jur. N. S. 785, is, however, an answer to this defense.

Where there are many existing nuisances, either to the air or to water, it may be very difficult to trace to its source the injury occasioned by any one of them; but if the defendants add to the former foul state of the water, and yet are not to be responsible on account of its previous condition, this consequence would follow: that if the plaintiffs were to make terms with the other pollutors of the stream, so as to have water free from impurities produced by their works, the defendants might say: "We began to foul the stream at a time when, as against you, it was lawful for us to do so, inasmuch as it was unfit for your use, and you cannot now, by getting rid of the existing pollutions from other sources, prevent our continuing to do what, at the time when we began, you had no right to object to.'" Attorney General v. Colney Hatch Lunatic Asylum, 4 Ch. App. 146, at page 150 (report of the expert) and page 155; Attorney General v. Leeds Corp, (1870) 5 Ch. App. 583, at page 595, where the Lord Chancellor says: "I think the argument deduced from the foul state of the water before it gets to Leeds is not deserving of any weight for two reasons: First, and it is hardly disputed, the evil did become seriously aggravated when the new sewer was opened,—that is to say, sixteen or seventeen years ago; and, secondly, the nuisance might terminate, and no one can say it was right that, when one nuisance terminates, there should be

another brought into existence." The sensible and material increase in the discoloration of the water in this case, resulting from the contribution of the defendant's mine, is clearly proved. The complainants were able to make white paper successfully and satisfactorily from February 1, 1892, for nearly a year, and until the serious discharge of discolored water from the defendant's shaft in January, 1893; and they were also able to make such paper after the discolored water ceased to run in June or July, 1893. During the intermediate period, while the discoloration of the water being discharged from the defendant's mine was the greatest, complainants could not make white paper satisfactorily.[1]

An individual citizen may abate a private nuisance injurious to his interests could also bring action.

§ 4. REMEDIES FOR NUISANCE.

AMOSKEAG M. CO. v. GOODALE

(46 N. H. 53.—1865.)

Trepass *quare clausum fregit,* for entering and willfully and maliciously removing, breaking and destroying 400 feet of plaintiff's flash-board, and pulling out the iron pins, against which said flash-boards rested, which formed a part of said plaintiff's dam, and willfully turning aside and diverting the waters of the Merrimack river from plaintiff's mills, etc.

BARTLETT, J. After the numerous decisions in this State and elsewhere, we cannot now regard it as an open question, whether the

[1] In Richards v. Daugherty, 133 Al. 569, 31 So. 934, (1902), it was "insisted by the respondent that the malaria which caused the members of the family of the complainant to have had chills and fevers was in part, if not entirely, generated by other natural ponds in that vicinity, and the decay of pine trees boxed for producing turpentine. Conceding for the purpose of this discussion, that respondent has shown that the ill-health of the community was in part the result of other causes than the malaria arising from these ponds, this does not relieve him of the duty imposed upon him by law of using his own land in such manner as not to injure his neighbor. And if these ponds materially contribute to the condition naturally existing productive of malarial diseases, and intensify or make more poisonous the malaria generated by the other causes, the respondent has no right to maintain them. Frost v. Phosphate Co. 42 S. C. 402, 20 S. E. 280, 26 L. R. A. 693, 46 Am. St. Rep. 736."

defendant would have been entitled to recover nominal damages of the plaintiffs, if they by their dam wrongfully caused the water of the river to flow back on his land perceptibly higher than its natural level, but without causing any actual damage to the defendant, for the " infringement of his right, which by repetition might ripen into an easement, " has been held a sufficient cause of action. Tillotson v. Smith, 32 N. H. 90; Woodman v. Tufts, 9 N. H. 91; Snow v. Cowles, 22 N. H. 302; Cowles v. Kidder, 24 N. H. 379 and 382; Bassett v. Salisbury Co., 28 N. H. 455; Gerrish v. Newmarket Co., 30 N. H. 484; 2 Hill. on Torts, 115, 126; Angell on W. C. 330, 340; Washburn on Easements, 569; and see Bassett v. Salisbury Co., 43 N. H. 578, and Eastman v. Amoskeag Co., 44 N. H. 159.

Where a party can maintain an action for a nuisance he may enter and abate it, Baten's Case, 9 Co. 54 b.; 3 Blk. Com. 220; 2 Hill. on Torts, 94 and 97, n., and Brown v. Perkins, there cited; 1 Hill. on Torts, 147; Great Falls Co. v. Worcester, 15 N. H. 438; Angell on W. C. sec. 389, and see Groton v. Haines, 36 N. H. 394; even though at times it caused but nominal damage to him, Great Falls Co. v. Worcester, 15 N. H. 434; Penruddock's Case, 5 Co. 101 b.; Adams v. Barney, 25 Vt. 231; Greensdale v. Halliday, 6 Bingh. 379; Washburn on Easements, 582, 584; Com. Dig. " Action on the case," D. 4.; Angell on W. C. sec. 390.

Although in general an erection cannot be abated as a nuisance unless it be such at the time, Great Falls v. Worcester, 15 N. H. 442; Washburn on Easements, 583; Angell on W. C. secs. 140, 390; yet an erection may be a nuisance at a time when it is causing no actual damage, Fay v. Prentice, 1 C. B. 828; Broom's Leg. Max. 290 and 292; and see Beach v. Trudgain, 2 Gratt. 219; and might have been abated as a nuisance on a *quod permittat,* Baten's Case, 9 Co. 53 b., or by the party whose rights were infringed. Penruddock's Case, 5 Co. 101 b. The remarks of BEST, Ch. J., in Lonsdale v. Nelson, 2 B. & C. 302, cited by the plaintiff, were made in reference to " nuisances from omission " only; and the expressions of FOWLER, J., in Graves v. Shattuck, 35 N. H. 269, have reference solely to the necessity of the force used to the protection of the party's property, and not to the general question of a party's right to abate a nuisance which causes him nominal damages.

The instructions of the court that the defendant would be justified in entering to remove the flash-boards wrongfully kept upon the

dam, only in case they caused him actual damage or made him apprehensive of immediate material injury, were erroneous.[1] * * *

The verdict must be set aside.

BROWN v. PERKINS.

(12 Gray, 89.—1858.)

SHAW, Ch. J. This is an action for breaking and entering the plaintiff's shop, and destroying various articles of property.

The defendants, denying the facts, and putting the plaintiff to proof, insist that if it is proved that they were chargeable with the breaking and entering, it was justifiable by law, on the ground that the shop was a place used for the sale of spirituous liquors, and so was declared to be a nuisance; that they had a right to abate the nuisance, and for that purpose to break and enter the shop, as the proof shows that it was done; that the shop contained spirituous liquors kept for sale; that the so keeping them was a nuisance by statute; that they had a right to enter by force and destroy them; that they entered for such purpose and destroyed such articles, and did no more damage than was necessary for that purpose.

[1] "Analyzed, the verdict of the jury in this case necessarily means that the plaintiff had sustained no special damage, although the defendant had maintained, as against her, a nuisance. The verdict establishes that such nuisance was being maintained at the time of the filing of the petition, or at least had been maintained at some time between the time of the commencement of the former action and the institution of the latter. The jury therefore properly awarded nominal damages; for, if a nuisance is shown to exist, the law imports damages for an injury to the right, and at least nominal damages may be recovered to protect the right." Farley v. Gate city Gaslight Co., 105 Ga. 323, 31 S. E. 193 (1898). *Accord*, Watson v. New Milford Water Co., 71 Conn. 442, 42 At. 265 (1899), diversion of water; Watson v. Town of New Milford, 72 Conn. 561, 45 At. 167 (1900), nuisance of sewage, but no proof of personal discomfort, or depreciation of property. Bungenstock v. Nishnabotna Drainage District, 163 Mo. 198, 64 S. W. 149 (1901.)

In East Jersey Water Co. v. Bigelow, 60 N. J. L. 201, 38 At. 631 (1897), it is said: "Therefore it is an actionable nuisance at common law for a mill owner or other person to turn a new stream into the stream, or, by means of a reservoir, to increase the volume of water naturally flowing in the stream. It is no defense to an action for such an injury that the person complaining is benefited by the increase in the volume of water, for no person can be compelled to have his premises improved, and has a right to their enjoyment in their natural condition, and according to his tastes and inclination."

A great many points were raised in the report, and argued, upon which the court have not passed; they are all passed over now for the purpose of coming to the main points which are decisive of the case.

The judge who sat at the trial stated that he ruled the law and directed the jury as stated in the report, subject to the opinion of the whole court, and when many other points were raised, he stated that it might be more convenient to report the whole case, so far as controverted points were presented, for the consideration of the whole court; and this, it was understood, was assented to by counsel.

Passing over all questions as to the plaintiff's case, and coming to the justification set forth in the answer, the court are of opinion, after argument, that the ruling and instructions to the jury were not correct in matter of law.

1. The court are of opinion that spirituous liquors are not of themselves a common nuisance, but the act of keeping them for sale by statute creates a nuisance; and the only mode in which they can be lawfully destroyed is the one directed by statute for the seizure by warrant, bringing them before a magistrate, and giving the owner of the property an opportunity to defend his right to it. Therefore it is not lawful for any person to destroy them by way of abatement of a common nuisance, and *a fortiori* not lawful to use force for that purpose.

2. It is not lawful by the common law for any and all persons to abate a common nuisance, merely because it is a common nuisance, though the doctrine may have been sometimes stated in terms so general as to give countenance to this supposition. This right and power is never intrusted to individuals in general, without process of law, by way of vindicating the public right, but solely for the relief of a party whose right is obstructed by such nuisance.

3. If such were intended to be made the law by force of the statute, it would be contrary to the provisions of the Constitution, which directs that no man's property can be taken from him without compensation, except by the judgment of his peers or the law of the land; and no person can be twice punished for the same offense. And it is clear that under the statutes spirituous liquors are property, and entitled to protection as such. The power of abatement of a public or common nuisance does not place the penal law of the Commonwealth in private hands.

4. The true theory of abatement of nuisance is that an individual citizen may abate a private nuisance injurious to him, when he could also bring an action; and also, when a common nuisance obstructs his individual right, he may remove it to enable him to enjoy that right, and he cannot be called in question for so doing. As in the case of the obstruction across a highway, and an unauthorized bridge over a navigable water-course, if he has occasion to use it, he may remove it by way of abatement. But this would not justify strangers, being inhabitants of other parts of the Commonwealth, having no such occasion to use it, to do the same. Some of the earlier cases, perhaps, in laying down the general proposition that private subjects may abate a private nuisance, did not expressly mark this distinction; but we think, upon the authority of modern cases, where the distinctions are more accurately made, and upon principle, this is the true rule of law. Lonsdale v. Nelson, 2 B. & C. 311, 312, and 3 D. & R. 566, 567; Mayor Etc., of Colchester v. Brooke, 7 Ad. & El. N. R. 376, 377; Gray v. Ayres, 7 Dana, 375; State v. Paul, 5 R. I. 185.

5. As it is the use of a building, or the keeping of spirituous liquors in it, which in general constitutes the nuisance, the abatement consists in putting a stop to such a use.

6. The keeping of a building for the sale of intoxicating liquors, if a nuisance at all, is exclusively a common nuisance; and the fact that the husbands, wives, children or servants of any person do frequent such a place and get intoxicating liquor there, does not make it a special nuisance or injury to their private rights, so as to authorize and justify such persons in breaking into the shop or building where it is thus sold, and destroying the liquor there found, and the vessels in which it may be kept; but it can only be prosecuted as a public or common nuisance in the mode prescribed by law.

Upon these grounds, without reference to others, which may be reported in detail hereafter, the court are of opinion that the verdict for the defendants must be set aside and a

New trial had.[1]

[1] The reporter notes that the death of the chief justice "prevented the writing out of a fuller opinion."

A person takes a risk when he undertakes to abate a nuisance by his own act.

HICKS v. DORN.

(42 N. Y. 47.—1870.)

Plaintiff's boat was moving from a dry dock into the Erie Canal at Vischer's Ferry, when the waste weir and gates of the dock suddenly gave way, letting out the water and leaving the boat projecting into the basin of the canal about 45 feet. It was not practicable to render the canal again navigable, without damming up the culvert, or restoring the dam and waste weir of the dry dock, or building a coffer dam around the stern of the boat, or cutting up and destroying the boat. The destruction of plaintiff's boat was the speediest way of restoring navigation. Defendant adopted it in good faith. The referee before whom the case was tried held the defendant was guilty of trespass, and found plaintiff's damages at $1856.14. Judgment was affirmed by the General Term, and defendant appealed.

EARL, Ch. J. It was the duty of the defendant, as superintendent of canal repairs, to keep in repair the section of the canal intrusted to him, and to remove obstructions to navigation; and he claims protection in this case on the ground that he was in the proper discharge of this duty when he cut up the plaintiff's boat. * * * It is claimed that the canal is, in law, a public highway, and that this boat was a public nuisance in such highway, interrupting navigation, which any person, and certainly a public officer, had a right to remove. It is not alleged in the answer, and it was not found by the referee, that it was a nuisance. Navigation was interrupted by the want of water, caused by the break; not so much by the boat. This boat was not in the canal in such a way as to interfere with the passage of boats. But there should have been an issue and finding upon this point. If the referee had found that this boat was a nuisance, the defendant would not necessarily have been justified in destroying it. In removing or abating nuisances, no unnecessary damage or injury to property can be justified, and the referee might have found still, as he has found, that the defendant should have adopted some other method to restore navigation than the destruction of the boat. * * * *

The plaintiff's boat was valuable private property. The plain-

tiff was in no degree in fault, and he did not in any way contribute to the break that caused the interruption of navigation. The duty of the defendant was imperative to repair the canal, and though the plaintiff's boat was private property, he had the right to destroy it, if such destruction was necessary to enable him to restore navigation. This right did not arise simply because it was more convenient to repair the canal by destroying the boat, nor because this was the cheapest or speediest way to do it. The destruction of this private property should have been a last resort, after other reasonable expedients had failed. When a public officer undertakes to destroy private property under the claim of great public or overruling necessity, he takes upon himself the burden of showing such necessity. Russell v. The Mayor Etc., of New York, 2 Denio, 475. All that can be claimed in this action is, that it was more convenient and speedier to repair in the way adopted than in any other. This does not make a case of overwhelming or pressing necessity within the rule. All the facts were before the referee and it was for him, upon the evidence, to determine whether the defendant discharged his duty as a reasonable, prudent and careful man; whether the defendant was justified in pursuing extraordinary rather than ordinary methods, and whether there was a pressing necessity for the destruction of the private property in question, and we ought not to disturb his decision upon these questions.

I therefore favor an affirmance of the judgment appealed from.

Judgment affirmed.

MISSOURI, K. & T. RY. v. BURT.

(27 S. W. 948. [Tex. Civ. App.] 1894.)

Action for damages caused by defendant's leaving the dead animal on its property, and thus creating a nuisance to plaintiff's injury. Judgment for $150, from which the railroad company appealed.

COLLARD, J. Appellant contends that, as the proof showed that plaintiff could have hauled the dead animal off of the right of way, or buried it, with slight expense, he was bound to do so in the exercise of reasonable care, and that by failure to do this he was guilty

of contributory negligence. The defendant's road where the dead animal lay was fenced. The mule was killed by defendant's cars running over it, and it was allowed to remain on the right of way inside defendant's fence, so near plaintiff's house as to create a nuisance. Plaintiff was not bound to remove the dead animal. To do so he would be compelled to make an opening in defendant's fence, and enter upon the right of way, or to commit a trespass. The judgment of the lower court is affirmed.

Affirmed.

A party may abate a nuisance by his own act, but he is not bound to follow this course.

CHAPTER XV.

NEGLIGENCE.

§ 1. NATURE OF THE TORT.

TOWANDA RY. CO. v. MUNGER.

(5 Den. N. Y. 255.—1848.)

BEARDSLEY, Ch. J. These oxen, when killed, were on the defendant's land. They had broken from the plaintiff's field into the highway, along which they wandered to the railroad, where, leaving the highway, they passed on the railroad to the place where the accident occurred. * * * If these oxen were not "lawfully going at large on the highways," their entry on the defendants' land could not be excused by the want, or defect of fences. The oxen were not in the highway for the ordinary purpose of travel in passing from one place to another, but having broken out of the plaintiff's field, were literally "at large," for grazing, rest or mischief, as their wants or instinct might prompt. This, in my judgment, was far enough from "lawfully going at large" in a highway, notwithstanding the legislature have declared that towns may determine the times and manner in which cattle, horses and sheep shall be permitted to go at large. * * * *

The present action is founded upon the alleged negligence of the agents and servants of the defendants, in running their engine on the railway, whereby, as is charged, the plaintiff's oxen were killed. It is not pretended the act was done, designedly, by the persons in charge, but simply that it occurred through their negligence and want of care.

It is a well-settled rule of law that such an action cannot be sustained if the wrongful act of the plaintiff coöperated with the misconduct of the defendants or their servants to produce the damage sustained. I do not mean that the coöperating act of the plain-

tiff must be wrong in intention, to call for the application of this principle, for such is not the law. The act may have been one of mere negligence on his part, still he cannot recover. Or his beast, while trespassing on the land of another person, and that without the consent or knowledge of its owner, may have been damnified through some careless act of the owner of the land, yet the fact of such trespass constitutes a decisive obstacle to any recovery of damages for such an injury. It is, strictly speaking, *damnum absque injuria.* The case of Blyth v. Topham, Cro. Jac. 158, was an action for digging a pit in a common, by occasion whereof the plaintiff's mare, straying there, fell into the pit and was killed. It was held by the whole court that the action would not lie; the plaintiff had no right in the common, and so, as against him, the digging of the pit was lawful. Precisely so in the present case; the plaintiff shows no right to have his oxen on the track of this railroad, for they were there straying; he therefore cannot set up that the engine was unfit for use or was run in a negligent manner. Bush v. Brainard, 1 Cowen, 78, was in principle like that of Blyth v. Topham. Some maple syrup had been left by the defendant in buckets in an open shed on his own uninclosed woodland. The plaintiff's cow came in the night and drank the syrup, which caused her death. It was agreed by the court "that, although the defendant was guilty of gross negligence," "the plaintiff, having no right to permit his cattle to go at large" on the defendant's land, could not recover. * * * *

Where that which is done by a party on his own land is illegal and punishable as such; or, although not illegal, if it be an act which probably may endanger human life, as the setting of spring guns, he may be responsible even to a voluntary trespasser for injuries thus sustained. Bird v. Holbrook, 4 Bing. 628; Jordin v. Crump, *supra.* But even in such a case, where the plaintiff had notice that deadly engines were placed in a wood, into which he, notwithstanding, entered and was severely wounded, it was held he could not maintain any action, having voluntarily brought the injury upon himself. Ilott v. Wilkes, 3 B. & Ald. 304. One who complains of another's negligence, should himself be without fault. Brownell v. Flagler, 5 Hill, 282; Cook v. The Champ. Trans. Co., 1 Denio, 99. Where the plaintiff, at the time of the alleged injury, was trespassing on the defendant, or otherwise wrong in the particu-

lar act complained of, such delinquency alone, with very limited exceptions, is a decisive answer to any claim for damages founded on the defendant's negligence.

Negligence is a violation of the obligation which enjoins care and caution in what we do. But this duty is relative, and where it has no existence between particular parties, there can be no such thing as negligence in the legal sense of the term. A man is under no obligation to be cautious and circumspect towards a wrongdoer. A horse straying into a field falls into a pit left open and unguarded; the owner of the animal cannot complain, for as to all trespassers the owner of the field had a right to leave the pit as he pleased, and they cannot impute negligence to him. But injuries inflicted by design are not thus to be excused. A wrongdoer is not necessarily an outlaw, but may justly complain of wanton and malicious mischief. Negligence, however, even when gross, is but an omission of duty. It is not designed and intentional mischief, although it may be cogent evidence of such an act. Story on Bl. secs. 19, 22; Gardner v. Heartt, 3 Denio, 236.[1] Of the latter, a trespasser may complain, although he cannot be allowed to do so in regard to the former.

In the present case the charge of the court was in several material respects erroneous. As to passengers on this railroad the defendants were certainly bound by the highest obligations of morality and law, to run their engines and trains, with the most scrupulous care and vigilance. It was also their duty to use every precaution to guard against communicating fire to buildings or other propery, adjacent to the line of their road, or otherwise doing injury thereto. But they owed no such duty to this plaintiff in regard to his oxen when trespassing on their land. The suggestions of the court below, on this part of the case, would be very appropriate to a case between a passenger who had been injured through the negligence of an

[1] In Proctor v. Railway Co., 61 S. C. 189, 39 S. E. 358, the court said: "Now, it is quite true that negligence may be so gross as to amount to recklessness; but when it does it ceases to be mere negligence, and assumes very much the nature of willfulness—so much so that it has been more than once held in this state that a charge of reckless misconduct will justify the jury, if the same be proved, in awarding punitive, vindictive, or exemplary damages, while it never has been held, so far as we are informed, that the jury, under a charge of mere negligence, would be justified in awarding vindictive or exemplary damages."

engineer, or the conductor of a train, but had no proper bearing on the case then to be decided by the jury.

The court seem to have held that if the plaintiff's oxen escaped from his enclosure after the exercise of "ordinary care and prudence in taking care of" them, he was not responsible for their trespass on the defendant's land. This view of the law, we think, cannot be sustained. The plaintiff was bound at his peril to keep his cattle at home, or at all events to keep them out of the defendant's close, and no degree of "care and prudence," if the cattle found their way on to the defendant's land, would excuse the trespass. It would be a new feature in the law of trespass, if the owner of cattle could escape responsibility for their trespasses by showing he had used "ordinary," or even extraordinary "care and prudence," to keep them from doing mischief.

I am strongly inclined to the opinion that further legislation would be proper to guard against the entry of cattle on land used for the tracks of railways. The loss of property in this manner is of no trivial consequence; but the personal injuries thus inflicted, and the occasional loss of human life, demand that every practicable effort should be made to avert such deplorable consequences.[1]

The judgment below should be reversed, and a *venire de novo* awarded.

Judgment reversed.

DEHSOY v. MILWAUKEE ELECTRIC RY. & LIGHT CO.

(110 Wis. 412; 85 N. W. 973.—1901.)

DODGE, J. * * * A further complaint made of the charge is that it instructs the jury that they may find proximate causation, if the injury "might reasonably have been expected by the conductor in the exercise of ordinary care as a man of intelligence, having the knowledge that may be reasonably expected and ought to have been had in doing such work." It is urged that only when such injury might have been expected by a man of ordinary intelligence and under like circumstances is there proximate causation in law.

[1] Such legislation was enacted L. 1850, c. 140, § 44, amended L. 1854, c. 282, § 8, and L. 1892, c. 676 § 32. For the law on this subject at present in New York, see Dolan v. N. D. & C. Ry. Co., 120 N. Y. 571 (1890.)

Without deciding that the omission of such qualifications is error, we are clear that the charge would have been more nearly accurate had it contained both of them. The standard with which comparison must be made to ascertain whether any injury might reasonably be anticipated is the conduct or foresight of ordinarily prudent, careful, and intelligent persons. The use of either of these adjectives without the qualifying adverb conveys the idea of something higher than the ordinary. A prudent man or an intelligent one is properly so characterized only because he is distinguished from the great mass of mankind by his prudence or intelligence. He is not typical of the mass or the average, but differentiated therefrom by the possession of the particular quality in higher degree. In applying the law of negligence, juries should have fully in mind that the duty demanded is that care and that foresight, and only that, which the great mass of mankind, or the type of that mass, the ordinarily prudent man, exercises under like circumstances. Nass v. Schulz, 105 Wis. 146, 81 N. W. 133; Hudson v. Railway Co., 107 Wis. 620, 83 N. W. 769.

SULLIVAN v. BOSTON ELEC. LIGHT CO.

(181 Mass. 294; 63 N. E. 904.—1902.)

At the end of the charge the court said: "I will state, Mr. Foreman and gentlemen, the statute provides that liability exists only by reason of negligence or carelessness of the person or corporation, or of the gross negligence or carelessness of any servant or agent of any person or corporation. You will see that there is a difference. One is the negligence or carelessness of the corporation itself, and the other is the gross negligence or carelessness of the servant or agent. That is not accidental,—that is intentional,—because there are well-known distinctions between gross negligence and what might be called ordinary negligence, if there is such a thing as ordinary negligence. I doubt if there is; but if there is such a thing as ordinary negligence it means the absence of ordinary care. That is what that means. Now, gross negligence, if you come to consider the gross negligence of any servant or agent of the defendant corporation,—if you come to consider the negligence of

such a person as that,—then to find the defendant liable on that ground the Boston Electric Light Company, or the other company, by the negligence of its servants or agents, you have got to find gross negligence. That is a very great degree of negligence,—a degree of negligence not amounting to wanton injury exactly, and yet one characterized by an utter disregard of a person's rights or a person's safety; something that is manifestly gross and extreme, amounting to a careless and utter disregard of the rights and safety of another. That would be as near as I could define it. It never has been defined, and I don't know as it ever can be. I have heard attempts made to define gross carelessness, but it means something more than carelessness. That is about all I can say."

HAMMOND, J. * * * The definition of gross negligence given at the end of the charge was sufficiently favorable to the defendant. The charge was full and correct, and the case was properly left to the jury under instructions sufficiently favorable to the defendant.

Exceptions overruled.[1]

[1]. In Galbraith v. West End. Street Ry. 165 Mass, 572., 34 N. E. 501. (1896), Lathrop. J. said: "The fifth, sixth, and seventh requests relate to the term 'gross negligence.' The plaintiff contends that the word 'gross' has no more effect than the word 'due' or 'ordinary.' But, while this view has been adopted in some jurisdictions, it never has been the law here. The term 'gross negligence' means something more than a want of ordinary care. It is used not only in St. 1886, c. 140, but also in Pub. St. c. 73, § 6; Id. c 112, § 212; Id. c. 202, § 34. See Copley v. New Haven & N. Co., 136 Mass. 6; Debbins v. Railroad Co., 154 Mass. 402, 404, 28 N. E. 274; Sullivan v. Railroad Co., 154 Mass. 524, 28 N. E. 911; Manley v. Railroad Co., 159 Mass. 493, 34 N. E. 951; Mullen v. Railway Co., 164 Mass. 450, 41 N. E. 664."

In Kentucky, the following instruction has been approved repeatedly: "The court instructs the jury that gross negligence is the failure to take such care as a person of common sense and reasonable skill in like business, but of careless, habits, would observe in avoiding injury to his own person or life under circumstances of equal or similar danger to the plaintiff on the occasion under consideration." Illinois Cen. Ry. v. Stewart. (Ky.) 63 S. W. 596, (1901); Louisville & N. Ry. v. Walden, (Ky.) 74 S. W. 694 (1903.)

In Purple v. Union Pac. Ry. 114 Fed. 123, 51 C. C. A. 564 (1902), Sanborn, J. said; "There was therefore no error in the refusal of the court to charge that if he was not a passenger the railroad company was liable to him for gross negligence. The term 'gross' in this connection is nothing but an epithet. It means no more than the failure to exercise ordinary diligence in the circumstances of the particular case. It distinguishes no legal degree of negligence, and it is not error to refuse to apply it to the negligence for which a defendant

COPELAND v. DRAPER.

(157 Mass. 558.—1893.)

HOLMES, J. Horne v. Meakin, 115 Mass. 326, the case relied on by the plaintiff, only decides that, if a party negligently furnishes an unsuitable horse, it is not a defense that he did not know that this horse was unsuitable. In the case at bar, negligence was excluded by the plaintiff's admission that there was no evidence that the defendant knew, or by the exercise of reasonable care could have known, that the horse was unsuitable, if in fact it was. Therefore in order to recover, the plaintiff must maintain that a livery stable keeper warrants or insures the suitableness of every horse which he lets.

No such liability is imposed on him by the fact that he follows a common calling, any more than it is upon every man who keeps a shop. Even in old times, the exercise of a common calling only required a man to show skill in his business. Fitzh. Nat. Brev. 94, D; Norris v. Staps, Hob. 210b, 211; 3 Bl. Comm. 164; Rex v. Kilderby, 1 Wm. Saund. 311, 312, note 2. Common carriers were insurers, not because they had a common calling, but because they were bailees, coupled with certain gradual changes in the law, not material here.

If it should be sought to charge the defendant for the horse as for a dangerous animal, the liability for a horse on that ground, apart from bailment, is confined to cases where the owner has notice of the dangerous tendency. Com. v. Pierce, 138 Mass. 165, 179; Dickson v. McCoy, 39 N. Y. 400, 403. See, also, Hawks v. Locke, 139 Mass. 205, 208. The suggestion has been made, following Mr. Justice STORY'S statement of the doctrine of Pothier, that bailors for hire generally warrant the suitableness of the thing let, Harrington v. Snyder, 3 Barb. 380, 381; Story, Bailm. §§ 383, 390; but the common law in general applies the principle of *caveat emptor* when the hirer has examined the article, Cutter v. Hamlen, 147 Mass. 471,

may be liable, because its use merely tends to create doubt and to increase confusion. Wilson v. Brett, 11 Mees & W. 113; The New World v. K, 16 How. 474, 14 L. Ed. 1019; Milwaukee Railroad Co. v. Arms, 91 U. S. 489, 494, [1865-66] L. R. C. P. 600; Perkins v. Railroad Co., 24 N. Y. 196, 207, 82 Am. Dec. 281."

475. See, further, Hawks v. Locke, *ubi supra;* MacCarthy v. Young, 6 Hurl. & N. 329.

The supposed warranty, if it existed, could not be placed on any of the foregoing considerations, but would have to stand on the analogy of carriers of passengers, taking their liability in the strictest form in which it ever has been taken. There have been intimations, if not decisions, in favor of such a view with regard to vehicles let for the known purpose of carrying passengers, Jones v. Page, 15 Law T. (N. S.) 619; Leach v. French, 69 Me. 389, 392; Harrington v. Snyder, 3 Barb. 380; Kissam v. Jones, 56 Hun, 432, 434, 10 N. Y. Supp. 94. Compare Francis v. Cockrell, L. R. 5 Q. B. 501, 503; Fowler v. Lock, L. R. 7 C. P. 272, L. R. 9 C. P. 751, note, L. R. 10 C. P. 90; but an opposite decision was reached in Hadley v. Cross, 34 Vt. 586, and in this Commonwealth even carriers of passengers do not warrant their vehicles, and are not liable if wholly free from negligence, Ingalls v. Bills, 9 Metc. 1; White v. Railroad Co., 136 Mass. 321, 324; Readhead v. Railway Co., L. R. 2 Q. B. 412, L. R. 4 Q. B. 379. It follows, *a fortiori,* that one who lets a horse does not warrant that it is free from defects which he does not know of, and could not have discovered by the exercise of due care. See Story, Bailm. § 391a; Edw. Bailm. § 373.

Judgment on the verdict.[1]

[1] See Siemsen v. Oakland etc., Ry. 134 Cal. 494, 66 Pac. 672 (1901): "In the instructions complained of, the court charged the jury as to the responsibility of defendant company for latent defects in the wheel. It is said by Shearman and Redfield in their work on Negligence (section 497): 'Whether he [defendant] is responsible for defects which could not have been thus discovered, after the vehicle came into his possession, but could have been discovered by the use of such tests during the process of manufacture, is a question upon which there is a difference of opinion. In New York it has been distinctly held that he is. It was so held in England many years ago, but in later cases the question has been purposely left open. In Massachusetts and Scotland it is held that he is not.' Of the New York cases bearing upon this question may be cited Hegeman v. Railroad Corp. 13 N. Y. 9, 64 Am. Dec. 517; Alden v. Railway Co., 26 N. Y. 102, 82 Am. Dec. 401; Birmingham v. Railroad Co., 59 Hun, 538, 14 N. Y. Supp. 13. In this state the rule as laid down in New York has been adopted. Treadwell v. Whittier, 80 Cal. 574, 22 Pac. 266, 5 L. R. A. 468, 13 Am. St. Rep. 175."

§ 2.— PROVING NEGLIGENCE.

GAVETT v. M. & L. RY. CO.

(16 Gray, 501.—1860.)

BIGELOW, Ch. J. The line which marks and separates the respective duties and functions of the court and jury is certain and well defined. The difficulty arises in determining on which side of this line particular cases fall; that is, in deciding whether a case presents only a question of law, or involves an inquiry into facts and the inferences deducible from them. Certainly the court in all cases should be scrupulously careful not to invade the province of the jury by undertaking to decide on the weight or effect of evidence, or by refusing to submit to their consideration any question of fact, material to the issue, which may be in dispute between the parties. On the other hand, it is the clear duty of the court to decide on the legal effect of the evidence, and to say whether it is such as to entitle a party to the verdict; otherwise the jury might be called on to decide a pure question of law. It may be said generally that it is the duty of the judge to decide whether there is any evidence; of the jury to determine upon its sufficiency. This may be illustrated by an example. Suppose the facts of a case were stated in the form of a special verdict in favor of a plaintiff. This would be supported if the facts so found comprehended all the material averments necessary to maintain the action. But if upon them, with all possible inferences which reasonable men might draw therefrom, there was an absence of an essential element which it was incumbent on the plaintiff to establish, there can be no doubt it would be the plain duty of the court to say, as a matter of law, that he had failed to maintain his action. In like manner, when the evidence offered by a party wholly fails to prove a material allegation, it is the province of the court to decide that no case is proved which can in law support a finding in his favor. In such case, the testimony furnishes nothing for the consideration of the jury, and it is as much the duty of the court to determine that there is no evidence to sustain the action, as to exclude evidence on the ground of its irrelevancy. If, however, there is a dispute upon the facts, or the credibility of witnesses is drawn in question, or a material fact is left in doubt by

the testimony, or there are inferences to be drawn from the facts in proof, then it would be proper to submit the case to the consideration and determination of the jury. Company of Carpenters v. Hayward, 1 Doug 374; Mitchell v. Williams, 11 M. & W. 216; Doyle v. Wragg, 1 Fost. & Finl. 7; Stormont v. Waterloo Life & Casualty Assurance Co., 1 Fost. & Finl. 22; Sawyer v. Nichols, 40 Maine, 216.

In the case at bar there is no dispute about any of the material facts upon which the plaintiff rests her claim to damages. If there is any discrepancy in the statements of the witnesses, the points of difference do not change in any degree the legal aspect of the case. The plaintiff not only failed to offer any evidence of ordinary care on her part at the time of the occurrence of the accident, but it appears, on the testimony adduced by her in support of her case, that she was guilty of negligence, which contributed to produce the injury of which she complains. One of two facts is established by the proof. After the train had started and was in motion, the plaintiff either passed out of the door and was on the platform of the car for the purpose of attempting to leave it, or she actually stepped from the platform of the car upon that in front of the station. While thus situated, she was thrown down and injured. It was therefore her attempt to leave the train, after it was in motion, that directly tended to bring about the casualty which occurred. Now it cannot be doubted that the well-known hazards of transportation on railroads, and the unprotected and exposed situation of persons standing on the platform of the car, or attempting to leave it when the train is about to start or is actually in motion, render it unsafe for passengers to place themselves in such a situation, and preclude the idea that due care can be exercised under such circumstances. In the absence of anything to create excitement or cause alarm, the attempt to leave a car, while the train is in motion, by passing to the outside or stepping off, is *prima facie* evidence of carelessness. So it was decided to be by the court in Lucas v. New Bedford & Taunton Railroad, 6 Gray, 64, in which it was held that the plaintiff was wanting in ordinary care in attempting to leave the cars when they were in motion.

The litigant must prove that the defendant was guilty of negligence. The law presumes that every person performs his legal duty.

CLAFLIN v. MEYER.

(75 N. Y. 260.—1878.)

HAND, J. The counsel for the respondent is correct in his position that the question of burden of proof is the material one upon this appeal. For the evidence is such that if it were incumbent upon the defendant to prove himself free from all negligence causing or attending upon the burglary, and not merely to leave the case as consistent with due care as with the want of it, it is clear that the judgment, so far as it adjudges his liability for the goods, must be affirmed, as we cannot say that such proof of a conclusive character was given. But the law, as to the burden of proof, is pretty well settled to the contrary. Upon its appearing that the goods were lost by a burglary committed upon the defendants' warehouse, it was for the plaintiffs to establish affirmatively that such burglary was occasioned or was not prevented by reason of some negligence or omission of due care on the part of the warehouseman.

The cases agree that where a bailee of goods, although liable to their owner for their loss only in case of negligence, fails, nevertheless, upon their being demanded, to deliver them, or account for such non-delivery, or, to use the language of SUTHERLAND, J., in Schmidt v. Blood, where " there is a total default in delivering or accounting for the goods " 9 Wend. 268, this is to be treated as *prima facie* evidence of negligence. Fairfax v. N. Y. C. & H. R. R. R. Co., 67 N. Y. 11; Steers v. Liverpool Steamship Co., 57 id. 1; Burnell v. N. Y. C. R. R. Co., 45 Id. 184. This rule proceeds either from the assumed necessity of the case, it being presumed that the bailee has exclusive knowledge of the facts and that he is able to give the reason for his non-delivery, if any exist, other than his own act or fault, or from a presumption that he actually retains the goods and by his refusal converts them.

But where the refusal to deliver is explained by the fact appearing that the goods have been lost, either destroyed by fire or stolen by thieves, and the bailee is therefore unable to deliver them, there is no *prima facie* evidence of his want of care, and the court will not assume in the absence of proof on the point that such fire or theft was the result of his negligence. Lamb v. Camden & Amboy R. R. Co., 46 N. Y. 271, and cases there cited; Schmidt v. Blood, 9 Wend. 268; Platt v. Hibbard, 7 Cow. 500 n. GROVER, J., in 46 N. Y.

supra, says, in delivering the opinion of the court, the question is "whether the defendant was bound to go further (*i. e.* than showing the loss by fire) and show that it and its employees were free from negligence in the origin and progress of the fire, or whether it was incumbent upon the plaintiffs to maintain the action to prove that the fire causing the loss resulted from such negligence." And he proceeds to show that the charge of the judge who tried the cause gave to the jury the former instruction and that this was contrary to the law and erroneous. So SUTHERLAND, J., in 9 Wend. *supra,* in the case of a warehouseman, says the *onus* of showing the negligence "seems to be upon the plaintiff unless there is a total default in delivery or accounting for the goods." And he cites a note of Judge COWEN to his report of Platt v. Hibbard, 7 Cow. 500, in which that very learned author says, criticising and questioning a charge of the circuit judge, "the distinction would seem to be that when there is a total default to deliver the goods bailed on demand, the *onus* of accounting for the default lies with the bailee; otherwise he shall be deemed to have converted the goods to his own use, and trover will lie, Anonymous, 2 Salk. 655; but when he has shown a loss, or where the goods are injured, the law will not intend negligence. The *onus* is then shifted upon the plaintiff."

It will be seen, as the result of these authorities, that the burden is ordinarily upon the plaintiff alleging negligence to prove it against a warehouseman who accounts for his failure to deliver by showing a destruction or loss from fire or theft. It is not of course intended to hold that a warehouseman, refusing to deliver goods, can impose any necessity of proof upon the owner by merely alleging, as an excuse, that they have been stolen or burned. These facts must appear or be proved with reasonable certainty. Nor do we concur in the view that there is in these cases any real "shifting" of the burden of proof. The warehouseman, in the absence of bad faith, is only liable for negligence. The plaintiff must in all cases, suing him for the loss of goods, allege negligence and prove negligence. This burden is never shifted from him. If he proves the demand upon the warehouseman, and his refusal to deliver, these facts unexplained are treated by the courts as *prima facie* evidence of negligence; but if, either in the course of his proof or that of the defendant, it appears that the goods have been lost by theft, the evidence must show that the loss arose from the negligence of the warehouseman.

Applying these principles to the present case, we must hold that when it appeared, as it did, that the goods were taken from defendants' warehouse by a burglarious entry thereof, the plaintiffs should have shown that some negligence or want of care, such as a prudent man would take under similar circumstances of his own property, caused or permitted or contributed to cause or permit that burglary.

Examining the case under this rule of law we find that there was no proof tending to show when the warehouse was entered, whether in the night or daytime. It was, it seems, during a large portion of every twenty-four hours in the custody of the government janitors. It does not appear nor is it found whether access to the warehouse was gained through the scuttle or roof or by the ordinary entrances, whether the thieves got in by stealth and broke out through the roof or broke in through the roof. The evidence was clear that access to the roof was gained from an adjoining tenement house by means of a burglar's ladder, and a blank brick wall rising some twenty or twenty-five feet above the roof of the tenement house was scaled by means of this ladder; that the goods were removed from the third story of the warehouse where they were stored, the packages being carefully replaced so as to delay observation and discovery, and the marks removed from the goods in an upper room of the tenement house, hired probably by the thieves for the purpose.

The plaintiffs rested their case upon the pleadings, without proving any demand or refusal, admitting a "robbery," but not attempting to show any negligence in the defendant.

The motion for dismissal of the complaint then made by the defendant on the ground that no negligence had been shown, that there was no evidence of refusal to deliver, and the burden was still upon the plaintiffs, should, I think, have been granted; and its denial may perhaps explain the subsequent finding by the referees. * * * *

Judgment reversed.[1]

[1] In Patton v. Texas & P. Ry. 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361 (1900), Brewer, J. said: "While, in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which, in the absence of some explanation or proof to the contrary, is sufficient to sustain a verdict against him, for there is *prima facie* a breach of his contract to carry safely (Stokes v. Saltonstall, 13 Pet. 181, 10 L. Ed. 115; New Jersey R. & Transp. Co. v. Pollard 22 Wall. 341, 22 L. Ed.

SEYBOLT v. THE N. Y. L. E. & W. RY. CO.

(95 N. Y. 561.—1884.)

RUGER, Ch. J. The cause of the accident, whereby the plaintiff's intestate lost his life, was left in some doubt by the testimony, and was altogether a matter of inference for the jury to draw from the circumstances appearing in evidence relating thereto.

No direct evidence was given on the subject by either party, the defendant seeking to establish the inference that it was occasioned by the breaking of an axle by proving from the evidence of its employees and others that the axle of the engine was found broken after the accident, and that its switches were properly set; that the road-bed and machinery of the train were of sound material, in good order and condition, and that the train was carefully and skillfully managed; and the plaintiff, from the nature of the accident, the results produced and the circumstances surrounding it, that it was occasioned by the negligence of the defendant's servants in setting the switches at the place of the accident, whereby the train was diverted from the main track and brought in collision with obstructions on a side track, which produced the injury complained of. It was undisputed in the case that the casualty occurred in the immediate vicinity of the switch; that the cars left the main track, following either upon or in the general line of the side track leading from the switch; that they came in collision with cars standing on the side track at a distance of several hundred feet from the switch, and that the proximate cause of the destruction of the mail car was the collision between the train and the cars standing on the side track. These circumstances afforded a strong presumption that the train was diverted from the main track by some disarrangement of the switch. No adequate cause for the various circumstances appeared in evidence except that afforded by the presumption of a misplaced switch.

877; Gleeson v. Virginia Midland R. Co. 140 U. S. 435, 443, 35 L. Ed. 458, 463. 11 Sup. Ct. Rep. 859), a different rule obtains as to an employee. The fact of accident carries with it no presumption of negligence on the part of the employer; and it is an affirmative act for the injured employee to establish that the employer has been guilty of negligence. Texas & P. R. Co. v. Barrett, 166 U. S. 617, 41 L. Ed. 1136, 17 Sup. Ct. Rep. 707."

Notwithstanding the positive evidence of witnesses to the effect that at different times, during the few hours preceding this accident, they had examined these switches and found them properly set and locked, there was sufficient evidence derivable from the undisputed facts, and the conflicting statements as to the situation of the connecting rails of the side track after the accident, to afford a support for the inference, probably drawn by the jury, that the accident was caused by a misplacement of one or both of the switches. There was evidence tending to show that the mail car was thrown from the side track a distance from thirty to fifty feet down an embankment, and was found to be lying nearly abreast of the engine, at right angles with it, and on fire, immediately after the accident occurred. The situation, not only of this car, but that of the baggage and smoking cars attached to it, was such that it could not probably have been produced except by a collision between a train moving with considerable velocity upon a clear track and a body offering great resistance.

From these facts the jury might very well have concluded that the evidence which attempted to account for the accident, on the theory that the train left the track near the upper switch in consequence of a broken axle, involving as it did the proposition that it must have run nearly four hundred feet over railroad ties and other obstructions before colliding with the cars standing on the side track, was quite improbable, and did not sufficiently account for the results disclosed by other undisputed evidence. There was evidence to support the finding of the jury upon the question of the defendant's negligence, and we see no ground upon which to interfere with the conclusions reached.

At the close of the case the defendant requested an instruction to the jury that "the burden of proof is on the plaintiff to establish the negligence of the defendant. If there is a reasonable doubt on the whole evidence as to the negligence of the defendant, the verdict should be for the defendant." We think the court committed no error in refusing to charge as requested. While it is true, as a general proposition, that the burden of showing negligence on the part of the defendant occasioning an injury, rests in the first instance upon the plaintiff, yet in an action of this character, when he has shown a situation which could not have been produced except by the operation of abnormal causes, the *onus* then rests upon the defendant to prove that the injury was caused without his fault. Caldwell

v. N. J. Steamboat Co., 47 N. Y. 291; Edgerton v. N. Y. & Harlem R. R. Co., 39 id. 227; Curtis v. R. & Syracuse R. R. Co., 18 id. 534. It was said by Judge GROVER in the Edgerton Case: "Whenever a car or train leaves the track it proves that either the track or machinery, or some portion thereof, is not in a proper condition, or that the machinery is not properly operated, and presumptively proves that the defendant, whose duty it is to keep the track and machinery in the proper condition, and to operate it with the necessary prudence and care, has in some respect violated his duty." "The court charged that the defendant was bound to show and give some explanation of the cause of the accident. This portion of the charge must be understood in reference to the facts of this case and as applied to such facts. In this view it was not erroneous." See, also, The J. Russell Mfg. Co. v. New Haven Steamboat Co., 50 N. Y. 121; Mullen v. St. John, 57 id. 572; Ginna v. Second Avenue R. R. Co., 67 id. 597. When this request was made the evidence had clearly raised a presumption of negligence against the defendant, and the only question relating thereto which remained for the jury to consider, was whether this presumption had been sufficiently negatived by the evidence introduced by the defendant. Under the authorities cited it would not have been error, even if the court had charged that the plaintiff had established a *prima facie* case, and the burden of explaining the cause of the accident then rested upon the defendant. The request must be considered with reference to all the facts appearing in the case at the time it was made, and as applied to them we do not think the defendant was entitled to the charge requested.

This request was also properly denied for the reason that it was coupled with the proposition that the jury should find for the defendant if they entertained a reasonable doubt upon the whole evidence as to the negligence of the defendant.

We are not aware of any rule applicable to the trial of issues of fact in civil actions which requires a party upon whom the burden of proof rests to establish a case free from reasonable doubt. In criminal cases the law, out of tender regard for the rights of accused persons, and the presumption of innocence which always attaches to persons in that situation, gives to the defendant the benefit of any reasonable doubt existing as to his guilt; but in civil actions, unless the issue involves the commission of a crime by some

of the parties thereto, the application of such rule is, we think, unauthorized by the law of evidence. * * * *

Judgment affirmed.

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§ 8. CONTRIBUTORY NEGLIGENCE.

MARTIN v. W. U. RY. CO.

(23 Wis. 437.—1868.)

DIXON, Ch. J. * * * The only remaining question is as to the alleged negligence of the plaintiff in permitting about one-fourth of a pane of glass to be out of the window of her house, through which the sparks are supposed to have passed and set fire to the clothing upon the inside. It does not appear when the glass was broken, or that the plaintiff knew it before the time of the fire. But suppose it had been broken for a long time, and the plaintiff knew it, it is but an exceedingly slight circumstance upon which to base the charge of negligence against her so as to prevent a recovery. The burning happened at a warm season of the year, when it is customary for most people, and convenience and comfort require them, to keep the windows of their houses wholly or partially open. Suppose, in such case, that the plaintiff's window had, according to the general custom, been open, and the sparks had entered in that way, would it have been such a careless or improper use of her house as would have defeated the action? Are the occupants of adjacent dwellings required to exercise so much care to prevent accidents of this nature happening from trains passing at an unlawful rate of speed, that they must, contrary to common usage, keep the windows closed when it would otherwise be most convenient and comfortable to have them opened? It seems clear to us that both these questions must be answered in the negative; and if they are, then the question here presented must also receive a negative answer. If it would not have been negligence in the plaintiff to have had the window open at the time, it clearly was not that a small part of a pane of glass was gone, and that she had neglected to have it replaced.

It follows from these views that the judgment must be affirmed.

By the court, judgment affirmed.[1]

[1] Whether the plaintiff must show his freedom from negligence, as well

RADLEY v. LONDON & N. W. RY.

(1 App. Cas. 754: 46 L. J. Ex. 573.—1876.)

LORD PENZANCE. * * * The remaining question is whether the learned judge properly directed the jury in point of law. The law in these cases of negligence is, as was said in the Court of Exchequer Chamber, perfectly well settled and beyond dispute.

The first proposition is a general one, to this effect, that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident.

But there is another proposition equally well established, and it is a qualification upon the first, namely, that though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him. This proposition, as one of law, cannot be questioned. It was decided in the case of Davies v. Mann, 10 M. & W. 546, supported in that of Tuff v. Warman, 5 C. B. N. S. 573, and other cases, and has been universally applied in cases of this character without question.

as defendant's negligence, in order to make out a case, depends upon the jurisdiction in which he sues. In New York he must; but the courts are careful to say: "It must not be understood that it is incumbent on the plaintiff, in the first instance, to give evidence for the direct and special object of establishing the observance of due care; it will be enough if the proof introduced of the negligence of defendants and the circumstances of the injury *prima facie* establish that the injury was occasioned by the negligence of the defendants." (Button v. H. R. R. Co., 18 N. Y. at p. 252. Cf. Tolman v. S. B. & N. Y. Ry. Co., 98 N. Y, 198.) In Pennsylvania the courts hold that there is a presumption that an injured person has done all that a prudent man would do in the circumstances to save himself from injury. (Weiss v. P. Ry. Co., 79 Pa. St. at p. 390.) See Burdick's Law of Torts, p. 431, 432 for a discussion and classification of authorities on this topic.

Contributory negligence will not defeat the plaintiff in admiralty, unless his fault is willful, gross or inexcusable. (The Max Morris, 137 U. S. 1.) Whether the plaintiff should recover exactly one-half of his damages, or his recovery should be fixed at more or less in the direction of the court, is left undecided by the Supreme Court, although the district judge award one-half damages.

The only point for consideration, therefore, is whether the learned judge properly presented it to the mind of the jury.

It seems impossible to say that he did so. At the beginning of his summing-up he laid down the following as the propositions of law which governed the case: It is for the plaintiffs to satisfy you that this accident happened through the negligence of the defendants' servants, and as between them and the defendants, that it was solely through the negligence of the defendant's servants. They must satisfy you that it was solely by the negligence of the defendants' servants, or, in other words, that there was no negligence on the part of their servants contributing to the accident; so that, if you think that both sides were negligent, so as to contribute to the accident, then the plaintiffs cannot recover.

This language is perfectly plain and perfectly unqualified, and in case the jurors thought there was any contributory negligence on the part of the plaintiffs' servants, they could not, without disregarding the direction of the learned judge, have found in the plaintiffs' favor, however negligent the defendants had been, or however easily they might with ordinary care have avoided any accident at all.

The learned judge then went on to describe to the jury what it was that might properly be considered to constitute negligence, first in the conduct of the defendants, and then in the conduct of the plaintiffs; and having done this, he again reverted to the governing propositions of law, as follows: "There seem to be two views. It is for you to say entirely as to both points. But the law is this, the plaintiff must have satisfied you that this happened by the negligence of the defendants' servants, and without any contributory negligence of their own; in other words, that it was solely by the negligence of the defendants' servants. If you think it was, then your verdict will be for the plaintiffs. If you think it was not solely by the negligence of the defendants' servants, your verdict must be for the defendants."

This, again, is entirely without qualification, and the undoubted meaning of it is, that if there was any contributory negligence on the part of the plaintiff, they could in no case recover. Such a statement of the law is contrary to the doctrine established in the case of Davies v. Mann,[1] and the other cases above alluded to, and in no part of the summing-up is that doctrine anywhere to be found. The learned counsel were unable to point out any passage addressed to it.

It is true that in part of his summing-up the learned judge pointed attention to the conduct of the engine-driver, in determining to force his way by violence through the obstruction, as fit to be considered by the jury on the question of negligence; but he failed to add that if they thought the engine-driver might at this stage of the matter by ordinary care have avoided all accident, any previous negligence of the plaintiffs would not preclude them from recovering.

In point of fact the evidence was strong to show that this was the immediate cause of the accident, and the jury might well think that ordinary care and diligence on the part of the engine-driver would, notwithstanding any previous negligence of the plaintiffs in leaving the loaded-up truck on the line, have made the accident impossible. The substantial defect of the learned judge's charge is that that question was never put to the jury.

On this point, therefore, I propose to move that your Lordships should reverse the decision of the Exchequer Chamber, and direct a new trial.

Decision reversed.[1]

1. The charge, in Tuff v. Warman, 2 C. B. N. S. 740. (1857), 5 C. B. N. S. 573, 27 L. J. C. P. 322. (1858), is as follows: "If both parties were equally to blame, and the accident was the result of their joint negligence, the plaintiff could not be entitled to recover; that, if the negligence or default of the plaintiff was in any degree the proximate cause of the damage, he could not recover, however great may have been the negligence of the defendant; but that, if the negligence of the plaintiff was only remotely connected with the accident, then the question was whether the defendant might not, by the exercise of ordinary care, have avoided it."

In Grand Trunk Ry. v. Ives, 144 U. S. 408, 429, 12 Sup. Ct, 679, 36 L. Ed. 485 (1892). it is said: "Although the defendant's negligence may have been the primary cause of the injury complained of, yet an action for such injury cannot be maintained, if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured; subject to this qualification, which has grown up in recent years, that the contributory negligence of the party injured will not defeat the action, if it be shown that defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence."

MENGER v. LAUER.

(55 N. J. L. 205.—1893.)

DEPUE, J. This was an action to recover damages for an injury done to a surveyor's instrument, known as a "transit," consisting of a telescope, compass, Vernier's scales, etc., mounted on a tripod, and standing, when set up in position, about five feet high. The declaration alleges that the plaintiffs were using the instrument upon a public highway, and that the defendant was driving along the said highway, and then and there did drive his horse and wagon so carelessly, negligently, and unskillfully that by his carelessness, negligence, and want of skill the said instrument was run into, and was thereby greatly damaged. At the trial the court nonsuited the plaintiffs on two grounds: (1) That there was no proof of negligence on the part of the defendant; and (2) that the plaintiffs were guilty of contributory negligence in exposing the instrument to danger by leaving it standing in the public highway.

The place where the occurrence happened was in Orient street, in the town of Rutherford. The street is 100 feet wide, with a roadway for vehicles 60 feet wide, from curb to curb, with a strip of macadam 15 feet wide in the middle of the roadway. The instrument was in charge of Worthington N. Jacobus, an employee of the plaintiffs, who, with two assistants, was engaged in surveying a plot of ground situated on the southerly side of the street. The instrument was set up in the middle of the street. One of the assistants was sent with a brush hook to clear away some bushes growing on the plot to be surveyed. Worthington and his other assistant were engaged at the side of the street, along the front of the plot, attending to the details of the work required to be done there. The instrument meanwhile was left standing in the middle of the road, without any one to look after it. The instrument had been left thus standing in the road about five minutes when the defendant came along in his wagon, and ran into it. The shaft of the wagon, coming between the legs of the instrument, pushed it over, and injured it. The defendant was driving slowly. He stopped his horse and turned around, immediately after the mishap, and said he did not notice the instrument. There was no contention on the part of the plaintiffs that the defendant's act was willful, and the only

proof of negligence was that at the time of the collision, as he was driving along, he was looking at some houses then being built on the side of the street, for the roofing of which he had contracted; that he was driving along at a slow pace, looking at the roofs to see whether the slaters were getting them finished. Worthington testified that, while setting up the instrument, he noticed the defendant down the road, but at that time he did not notice that the defendant was coming on, and that, not having occasion afterwards to look at the street, the witness did not know that the defendant was coming up the street towards him; that, when the witness saw the defendant, he was about 500 feet from the place where the instrument was set.

The instrument, standing in the traveled way of a public street, was a nuisance. It was left standing in that place without anyone in charge to look after it, and warn persons lawfully using the public street of its presence there; and Jacobus knew that the defendant was in the street, with his horse and wagon, and might have occasion to pass that part of the street. It was an act of negligence in Jacobus to leave the instrument in the street, without any one to look after it and care for it.

To sustain the plaintiffs' right to recover damages notwithstanding the instrument was negligently exposed to liability to injury in the manner in which this injury was received, counsel rely upon the much-canvassed case of Davies v. Mann, 10 Mees. & W. 546, and Radley v. Railroad Co., 1 App. Cas. 754. The earliest case in which the doctrine of contributory negligence as a bar to an action was clearly expressed is Butterfield v. Forrester, 11 East, 60, decided in 1809. The suit was against the defendant, who had placed an obstruction in the highway, by means of which the plaintiff, who was riding along the road, was thrown from his horse and injured. The plaintiff was riding violently, and did not observe the obstruction. At the trial, BAYLEY, J., directed the jury that if they were satisfied that the plaintiff was riding along the street extremely hard, and without ordinary care, they should find a verdict for the defendant, which they accordingly did. In denying a new trial, Lord ELLENBOROUGH, in the King's Bench, tersely stated the principle in these words: "One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action. An obstruction in the road, and no want of ordinary care to avoid it on the part of the plaintiff." The rule of law

laid down in Butterfield v. Forrester was expressly approved in Bridges v. Railway Co., 3 Mees. & W. 244; and in Davies v. Mann, Baron PARKE said: "This subject was fully considered by the court in Bridges v. Railway Co., where it appears to me the correct rule is laid down concerning negligence, namely, that the negligence which is to preclude a plaintiff from recovery must be such as that he could, by ordinary care, have avoided the consequence of the defendant's negligence." The facts appearing in Davies v. Mann were these: The plaintiff, having tethered the forefeet of the donkey, turned it on the public highway. The roadway was eight yards wide. At the time the donkey was injured it was grazing on the side of the road, and the defendant's team, coming down a slight descent at a smartish pace, ran against it, and knocked it down. The driver of the wagon was then some little distance behind the horses. In commenting upon the charge of the trial judge, Baron PARKE said: "The judge simply told the jury that the mere fact of negligence in leaving the donkey on the public highway was no answer to the action, unless the donkey's being there was the immediate cause of the injury, and that, if they were of opinion that it was caused by the fault of the defendant's servant, * * * the mere fact of putting the ass upon the road would not bar the plaintiff of his action." On this assumption the court held that as the defendant might, by proper care, have avoided injuring the animal, he was liable for the consequence of his negligence, though the animal may have been improperly there. Davies v. Mann was decided upon the distinction between a faulty act of the plaintiff, remotely connected with the injury, and his negligence as a proximate cause; taking "proximate" in its legal sense, as signifying closeness of causal connection. Kuhn v. Jewett, 5 Stew. Eq. 648.

Cases in the line of decision with Davies v. Mann simply apply to the plaintiff's conduct, as well as to the defendant's, the maxim, "*Causa proxima non remota spectatur.*" In a collision case, where the tug injured took a course in the direction which gave occasion for a collision with the defendant's steamer, Lord Chancellor SELBORNE, in the House of Lords, said: "Great injustice might be done, if, in applying the doctrine of contributory negligence, the maxim, '*Causa proxima non remota spectatur,*' were lost sight of. When the direct and immediate cause of damage is clearly proved to be the fault of the defendant, contributory negligence by the plaintiff cannot be established merely by showing that if those in charge of the

ship had, in some earlier state of navigation, taken a course, or exercised a control over the course taken by the tug, which they did not actually take or exercise, a different situation would have resulted, in which the same danger might not have occurred. Such an omission ought not to be regarded as contributory negligence, if it might, in the circumstances which actually happened, have been unattended with danger but for the defendant's fault, and if it had no proper connection as a cause with the damage which followed as its effect." Spraight v. Tedcastle, 6 App. Cas. 217–219. Davies v. Mann was so understood by Lord CAMPBELL in Dowell v. Navigation Co., 5 El. & Bl. 195, 206. In that case the action was by the owner of a collier against the owner of a colliding steamer to recover damages sustained by a collision. The collier was in fault, in that it did not continue to show a light for a reasonable time as it approached the steamer. Lord CAMPBELL, in delivering judgment, said: "The jury must be taken to have found that this fault led to the collision. If it was a proximate cause of the collision, however much the steamer might be in fault, this action cannot be maintained. * * * In a court of common law the plaintiff has no remedy if his negligence, in any degree, contributed to the accident. In some cases there may have been negligence on the part of a plaintiff, remotely connected with the accident; and in these cases the question arises whether the defendant, by the exercise of ordinary care and skill, might have avoided the accident, notwithstanding the negligence of the plaintiff, as in the often-quoted Donkey Case, (Davies v. Mann.) There, although without the negligence of the plaintiff the accident could not have happened, the negligence is not supposed to have contributed to the accident, within the rule upon this subject; and, if the accident might have been avoided by the exercise of ordinary care and skill on the part of the defendant, to his gross negligence it is entirely ascribed; he, and he only, proximately causing the loss." In that case the rule laid down by the court was that "a plaintiff cannot recover at law for mischief done to his ship by its being struck by defendant's ship, in consequence of the latter being improperly managed, if it appears that such improper management directly contributed in any degree to the accident, however much the defendant may also be in fault, though, if there be negligence on the part of the plaintiff only remotely connected with the accident, the question is whether the defendant, by ordinary care and skill, might have avoided the accident."

Tuff v. Warman, reported in 2 C. B. (N. S.) 740, and in the Exchequer Chamber in 5 C. B. (N. S.) 573, is cited as establishing the general proposition that the plaintiff will not be disentitled to recover if the defendant might, by the exercise of ordinary care on his part, have avoided the consequences of the plaintiff's carelessness. But it will be observed that the instruction of the trial judge, which was approved in both courts, was that "If both parties were equally to blame, and the accident was the result of their joint negligence, the plaintiff could not be entitled to recover; that, if the negligence or default of the plaintiff was in any degree the proximate cause of the damage, he could not recover, however great may have been the negligence of the defendant; but that, if negligence of the plaintiff was only remotely connected with the accident, then the question was whether the defendant might not, by the exercise of ordinary care, have avoided it." In the Common Pleas, Lord Chief Justice COCKBURN said: "I think the direction was right, and that the true question in these cases is whether, the damage having been occasioned by the negligence of the defendant, the negligence of the plaintiff directly contributed to it. * * * The way in which it was put on the part of the defendant was this: That by his own negligence, in omitting to keep any lookout, the plaintiff contributed to the accident. If that had been established to the satisfaction of the jury, the plaintiff's negligence would have been directly contributory, and the defendant would have been entitled to a verdict." CROSWELL, J., quoted with approbation the extract above quoted from Lord CAMPBELL'S opinion, in Dowell v. Navigation Co. WILLIAMS, J., after citing the same case, said: "The law was there laid down, in conformity with several previous decisions, that, if the negligence or default of the plaintiff was in any degree the proximate cause of the damage, he cannot recover, however great may have been the negligence of the defendant, but that if the negligence of the plaintiff was only remotely connected with the accident, then the question is whether the defendant might not, by the exercise of ordinary care, have avoided it. So far the doctrine of the cases is perfectly plain." He added: "I dissent entirely from the proposition that the plaintiff is disentitled to recover if his negligence is either proximately or remotely connected with the accident; but I feel great difficulty in dealing with the question whether the negligence was proximate or remote, and certainly feel great difficulty in getting rid of that question of law by leaving it

to the jury." In the Exchequer Chamber, as in the court below, the contention of the defendant's counsel was that whether the plaintiff directly or indirectly contributed to the injury was immaterial; if he contributed to it by his negligence at all, he could not recover. In the judgment of affirmance this contention was repudiated, and the instruction of the trial judge was sustained. In the judgment of affirmance in the Exchequer Chamber, WRIGHTMAN, J., laid down the rule to be that "the proper question for the jury in this case, and, indeed, in all others of the like kind, is whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune, by his own negligence or want of ordinary and common care and caution, that but for such negligence or want of ordinary care and caution on his part the misfortune would not have happened. In the first case the plaintiff would be entitled to recover; in the latter, not, as but for his own fault the misfortune would not have happened. Mere negligence or want of ordinary care or caution would not, however, disentitle him to recover, unless it were such that, but for that negligence or want of ordinary care and caution, the misfortune could not have happened, nor if the defendant might, by the exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff." A reasonable construction of these paragraphs would apply the concluding member of the last sentence to the introductory words of the same sentence, and not extend it so that it should qualify all that is contained in the preceding sentences, especially in view of the prior decisions, and of the charge of the trial judge, which was approved. But in Radley v. Railway Co., 1 App. Cas. 754, 759, Lord PENZANCE used the following language: "The first proposition is a general one, to this effect: That the plaintiff, in an action for negligence, cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident. But there is another proposition equally well established, and it is a qualification upon the first, namely, that though the plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet if the defendant could, in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him." The qualification expressed in the latter opinion, as I have endeavored to

show, cannot be considered as supported by Davies v. Mann; for, as already said, the court, in that case, in approving the charge of the trial judge, assumed that the mere fact that the donkey was on the roadside was not the immediate cause of the injury. And it is indisputable that if this qualification be accepted literally, as applying in all cases in which the plaintiff's negligence "contributed to cause the accident," the qualification overturns the general rule it purports to qualify, and lays upon the defendant liability for an injury which is the product of the coöperating negligence of both parties. Indeed, in such a case, the person injured is the favored party; for he may recover his damages of the other party if the latter, by the exercise of ordinary care, could have avoided the consequences of the former's negligence. Take the case of a collision between two persons driving on the highway, occasioned by the want of ordinary care by both parties, in which A.'s wagon is broken, and B.'s horse killed, and cross suits for damages are brought. In each case the trial judge would be required to charge that the plaintiff's negligence, although it contributed to cause the accident, would not disentitle him to a verdict if the defendant, by exercising ordinary care, could have avoided the consequences of the plaintiff's negligence; and the result would follow that B. would be compelled to pay the damages done to A.'s wagon, and would recover of A. the value of his horse. Giving to Radley v. Railway Co. the construction the language used in the opinion appears to justify, this case was with good reason sharply criticised by Mr. Thompson. 2 Thomp. Neg. p. 1155, § 7. Mr. Pollock, after a review of Radley v. Railway Co., in connection with Tuff v. Warman, says: "That the true ground of contributory negligence being a bar to recovery is that it is a proximate cause of the injury; and negligence on the plaintiff's part, which is only part of the inducing causes, or," (he adds in a note,) "as Mr. Wharton puts it, is not a cause, but a condition, will not disable him." (Pol. Torts, 378, and note *w*.) If this construction be admissible, the law on this subject, in effect, and except in matters of mere verbiage, is brought to the legal rule, adopted by the Queen's Bench in Dowell v. Navigation Co., and by the Common Pleas in Tuff v. Warman.

In Railroad Co. v. Ball, the suit was by a passenger to recover damages for injury received from a collision of another train with the train in which he was a passenger. The plaintiff at the time of the injury was riding in the baggage car. This court held that if the

plaintiff's injuries had been received from the fall of trunks negligently placed, or from being struck by trunks negligently thrown in loading or unloading, or from any other causes incident to the use of that compartment as the place for the carriage of baggage, his negligence in taking a place exposed to such risks would have deprived him of any right to enforce liability on the company for its negligence producing injury from such causes, but that his conduct, even if it be considered as contributing to an injury received from extraneous causes, such as a collision, would not debar his recovery of damages for such an injury. (24 Vroom, 283, 297, 290.) This case is an illustration of the distinction between negligence on the part of the plaintiff so remote from the injury sustained as not to be a cause thereof, and negligence proximately contributing to the injury, and in that sense was approved and applied by the Court of Errors and Appeals in Watson v. Railroad Co., *supra*, 125.

In this State the established rule is that if the plaintiff's negligence contributed to the injury, so that, if he had not been negligent, he would have received no injury from the defendant's negligence,—the plaintiff's negligence being proximately a cause of the injury,—he is without redress, unless the defendant's act was a willful trespass, or amounted to an intentional wrong, and in such a case the comparative degree of the negligence of the parties will not be considered. Express Co. v. Nichols, 4 Vroom, 435; Railroad Co. v. Righter, 13 id. 180. In the trial of cases of this kind, where it appears that both parties were in fault, the primary consideration is whether the faulty act of the plaintiff was so remote from the injury as not to be regarded, in a legal sense, as a cause of the accident, or whether the injury was proximately due to the plaintiff's negligence, as well as to the negligence of the defendant. If the faulty act of the plaintiff simply presents the condition under which the injury was received, and was not, in a legal sense, a contributory cause thereof, then the sole question will be whether, under the circumstances, and in the situation in which the injury was received, it was due to the defendant's negligence. But if the plaintiff's negligence proximately—that is, directly—contributed to the injury, it will disentitle him to a recovery, unless the defendant's wrongful act was willful, or amounted to an intentional wrong. A court of law cannot undertake to apportion the damages arising from an injury caused by the coöperating negligence of both parties, or to determine the comparative degree of the negligence of each.

In the case in hand the plaintiff's counsel put his case on Davies v. Mann, and especially on Radley v. Railway Co., and contended that no matter if there was negligence on the part of the plaintiff, in leaving the instrument on the highway, he was entitled to recover, if the defendant might have avoided the consequences of that negligence by exercising ordinary care. This contention cannot be sustained. Set up in the roadway, the person in charge of the instrument knew that it was liable to injury from passing vehicles, driven with the utmost care. He left the instrument exposed to injury without any one to look after its safety, or to warn persons of its presence. His negligence was an immediate, concurring, and co-operative cause of the injury, within the rule which debars a plaintiff from recovering damages for the injury sustained. Nor was there any evidence of negligence on the part of the defendant. In Davies v. Mann the defendant's team was being driven "at a smartish pace," without the driver in immediate charge of the team. As construed by Mr. Justice BLACKBURN in Radley v. Railroad Co., L. R. 10 Exch. 107, the defendant's negligence was "in driving furiously, and in a way which would have been negligent if there had been no donkey there, because he had every reason to expect that other people would have come there." The only evidence tending to show carelessness by the defendant was that, at the time of the collision, he was looking at some houses on the side of the street, to see how the slaters in his employ were getting on with the work. He was driving slowly. The street was unobstructed, except by the plaintiff's instrument. The defendant did not see the instrument, and he had no reason to expect to encounter an obstacle of that, or any other, character.

On both grounds the nonsuit was proper, and the judgment should be affirmed.

PURTELL v. JORDAN.

(156 Mass. 573.—1892.)

KNOWLTON, J. There was evidence from which the jury might have found that the injury to the plaintiff was caused by the negligence of the defendants' servant in driving too fast, when, by reason of the gathering darkness, and the close proximity of the high loaded

team, he was unable to see whether any one was on the crossing, about to pass immediately before him. The jury might also have found that the plaintiff was using such care as persons of ordinary prudence are accustomed to exercise under like circumstances. The court rightly refused to order a verdict for the defendants. The defendants requested the presiding justice to instruct the jury as follows: "That if the plaintiff, standing where he was on Harrison avenue, could not, before he attempted to cross the street, by reason of the position and movement of the large team, see vehicles coming down Harrison avenue and approaching Oak street, he was not in the exercise of due care in attempting to cross the street until such obstacle to his view was removed." "If, when the plaintiff started to cross Harrison avenue, he could not see defendants' team approaching by reason of the position of the large team, and attempted to cross so closely to the rear of the large team that he could not see defendants' team approaching until he got by the large team, he was not in the exercise of due care." It is urged in behalf of the defendants that it is always negligent for a pedestrian in the streets of Boston to attempt to cross behind a high loaded team until the team has passed so far as to enable him to see that no other team is coming from behind it on the other side. We cannot lay this down as a legal proposition. Bowser v. Wellington, 126 Mass. 391; Shapleigh v. Wyman, 134 Mass. 119. The circumstances of different cases so vary, and the natural and usual methods of crossing our crowded streets are so affected by facts and influences which are difficult of statement, and which are seldom found twice in the same combination, that there are few rules of law which can be arbitrarily laid down in reference to the effect of particular acts. When a pedestrian is run over by a team on a street, the question whether there was negligence on his part, or on the part of the driver of the team, or on the part of both of them, is usually a question of fact to be decided by the jury. One passing behind a loaded team which obstructs his view has no such reason to apprehend danger from a team driven in the opposite direction, when he hears nothing, as he would have if he were crossing over one track of a railroad to another on which a rapidly moving train might be coming. Of course he should take precautions, and endeavor to ascertain whether he is exposing himself to danger. But, in view of the rate of speed at which horses are ordinarily driven in crowded streets, and the control which is usually exercised over

them, to determine what precautions are necessary to prevent being run over is commonly a matter of fact, and not of law. We are of opinion that the instructions requested were rightly refused.

SMITHWICK v. HALL.

(59 Conn. 261.—1890.)

TORRANCE, J. The general question for our advice in this case is whether the plaintiff, upon the facts found, is entitled to the substantial damages or only to the nominal damages found by the court below. Inasmuch as that court has expressly found that the negligence of the defendant caused or contributed to the injury for which the plaintiff seeks to recover, the decision of the above general question depends upon this single point, namely, whether the acts and conduct of the plaintiff, as set forth upon the record, constitute or amount to such contributory negligence on his part as will bar his right to substantial damages. The facts found, so far as they bear upon the question for decision, are in substance the following: The plaintiff was a workman in the service of the defendant, and at the time of the injury complained of was engaged in helping to store ice for the defendant in a certain brick building. In doing this work the plaintiff stood upon a platform about 5 feet wide and 17 feet long, raised 15 feet above the ground, and extending from the west side of the building easterly to a point about 2 feet east of the door or aperture through which the ice was taken into the building. A stout plank of suitable height and strength extended along the outer side of the platform as far as the west side of the door, and served as a protective railing or guard to that portion of the platform. In front of the door, and east of it, the platform was without guard or railing of any kind. A short time prior to the injury the foreman of the defendant stationed the plaintiff on the platform just west of the door, and inside the railing, and showed him what his duties were there, and told him "not to go upon the east end of the platform east of the slide and door, as it was not safe to stand there." He did not tell the plaintiff why it was not safe, but the danger which he had in mind was the narrowness and unrailed condition of the platform, and the liability by inadvertence to misstep or fall

or slip off, the latter being aggravated by the liability of the platform to become slippery from broken ice. These dangers were all manifest. The peril resulting from the accident which happened to the building was not in contemplation. After the foreman went away the plaintiff, in spite of the orders so given to him, and for reasons of his own apparently, went over to the east end of the platform, and worked there. It is found that there was no sufficient reason or excuse for the change of position. One of his fellow-workmen, seeing the plaintiff in that place, told him that "it was not safe, and to stand on the other side," but the plaintiff, notwithstanding such warning, remained at work there. While so at work the brick wall of the building above the platform, in consequence of the negligence of the defendant, gave way, the brick falling upon the platform, and thence to the ground. The plaintiff was struck by portions of the descending mass, and fell to the earth. He was either knocked off, or his fall, in the condition in which he stood, was inevitable; indeed, had he not fallen when he did, his injuries, which were very serious, would have been worse. Most of the injuries which he actually sustained were occasioned by the fall. The plaintiff had no knowledge that the wall would be likely to fall, or was in any way unsafe, and it is found that "no fault or negligence can be imputed to him in this regard." In contemplation of the peril from the falling wall, it is found that "the spot where the plaintiff stood could not have been considered more dangerous than the place where he was directed to stand, though in fact most of the brick fell upon the side where he stood, and the result demonstrated, therefore, that the other side would have been safer in the event which occurred."

Upon these facts the defendant contends that the plaintiff, in going to and remaining on the east end of the platform, contrary to the orders and in spite of the warning given him, and in view of the obvious and manifest danger in so doing, was guilty of such contributory negligence as bars him of his right to recover more than nominal damages. If the plaintiff's injuries had resulted from any of the perils and dangers attendant upon the mere fact of his standing and working on the east end of the platform, which were obvious and manifest to any one in his place, which were in the mind of the foreman when he told the plaintiff not to go there, and in view of which his fellow-workman warned him, then this claim of the defendant would be a valid one. But upon the facts found it

is without foundation. The injury to the plaintiff was not the result of any such dangers, but was caused through the negligence of the defendant by the falling walls. This was a source of danger of which he had no knowledge whatever. He was justified in supposing that the wall was safe, and would not be likely to fall upon him, no matter where he stood on the platform. He had no reason to anticipate even the slightest danger from that source before or after he changed his position. This being so, he could be guilty of no negligence with respect to this source of danger by changing his position contrary to orders; for negligence presupposes a duty of taking care, and this, in turn, presupposes knowledge or its legal equivalent. With respect to that danger, the plaintiff, upon the facts found, must be held to have acted as any reasonably careful man would have acted under the same circumstances. In changing his position contrary to orders, he voluntarily took the risk of all perils and dangers which a man of ordinary care in his place ought to have known or could reasonably have anticipated; but as to dangers arising through the defendant's negligence from other sources,—dangers which he was not bound to anticipate and of whose existence he had no knowledge,—he took no risk and assumed no duty of taking care. It was the duty of the defendant, on the facts found, to warn the plaintiff against the danger from the falling wall. Now, the act or omission of a party injured, which amounts to what is called "contributory negligence," must be a negligent act or omission, and in the production of the injury it must operate as a proximate cause, or one of the proximate causes, and not merely as a condition. In the case at bar the conduct of the plaintiff, as we have seen, was, with respect to the danger from the falling wall, not negligent, for the want of knowledge or its equivalent on the part of the plaintiff. Nor was his conduct, legally considered, a cause of the injury. It was a condition, rather. If he had not changed his position, he might not have been hurt. And so, too, if he had never been born, or had remained at home on the day of the injury, it would not have happened; yet no one would claim that his birth, or his not remaining at home that day, can in any just or legal sense be deemed a cause of the injury. The court below has found that the plaintiff's fall in the position in which he stood was due to the giving way of the wall, and that most of his injuries were occasioned by the fall. His position there, upon the facts found, can no more be considered as a cause of the injury, than it could be in a case

where the defendant, in doing some act near the platform without the plaintiff's knowledge, had negligently knocked him to the ground, or had negligently hit him with a stone. Had the injury been occasioned by a misstep or slip from the platform by the carelessness of the plaintiff, or for the want of a railing, the causal connection between the change of position and the injury would, legally speaking, be quite obvious; but, from a legal point of view, no such connection exists between the change of position and the giving way of the wall.

The plaintiff had full knowledge of and was abundantly cautioned against certain particular sources of peril and danger, and he voluntarily neglected the warnings and took the risk of those perils and dangers. He was injured through the negligence of the defendant from an entirely different source of danger, of which he knew and could know nothing, and of whose existence it was the duty of the defendant to warn him. Under these circumstances, the failure or neglect to heed the warning does not constitute contributory negligence. Gray v. Scott, 66 Pa. St. 345. In the case cited certain boys had been warned not to play at a certain point because of some particular and obvious dangers existing there. They failed to heed the warning, and one of them, playing at that place, was killed. His death was caused by the negligence of another, and came from a source of danger not obvious, and entirely different from any the boys had been warned against. In answering the argument that the boy's failure to heed the warnings was a cause of his death, and contributory negligence, the court say: "But because he was under the tramway in the passage below, it is thought he was guilty of contributory negligence. He could not be guilty of negligence as to the defendant without there was some reason to expect danger, and a duty of care on his part in relation to it. There was ordinarily one. He had a right, therefore, to suppose everything secure and safely managed on the tramway, and because it was not he was killed. Precisely the same argument could have been used if the boy had been killed in that place by the negligent use of fire-arms discharged a hundred yards off." The defendant seems to claim, however, that, although some of the plaintiff's injuries were caused by falling bricks, yet most of them were caused by his fall; and that, as he probably would not have fallen had he remained behind the railing, he contributed to his injury by placing himself where, in case of such accident, there was nothing to prevent his fall.

Whether the claim that he would probably not have fallen had he remained where he was stationed be true or not, must forever remain matter of conjecture. But if its truth could be demonstrated it would not, as we have seen, change the relation of the plaintiff's act to the legal cause of his injury, or make that act, from a legal standpoint, a contributing cause when it was but a condition. And if the claim means that the plaintiff by his act increased the injury merely, then, if this were true, it would not be such contributory negligence as would defeat the action. To have that effect it must be an act or omission which contributes to the happening of the act or event which caused the injury. An act or omission that merely increases or adds to the extent of the loss or injury will not have that effect, though, of course, it may affect the amount of damages recovered in a given case. Gould v. McKenna, 86 Pa. St. 297; Stebbins v. Railroad Co., 54 Vt. 464. This claim, however, on the facts found, is wholly without foundation. The plaintiff is entitled to judgment in his favor for $1,000, and the Superior Court is so advised. In this opinion the other judges concurred.[1]

MEARNS v. CENTRAL RAILROAD OF NEW JERSEY.

(168 N. Y. 108 : 57 N. E. 292.—1900.)

HAIGHT, J. This action was brought to recover damages for a personal injury. The plaintiff was a passenger on the defendant's vestibuled train known as the "Royal Blue Line," leaving Washington about noon on the 20th day of December, 1894, and arriving at Jersey City about 6 o'clock of the same evening. As the train was nearing the station at Jersey City the conductor or guard called

[1] In Cincinnati L. & A. Elec. Ry. v. Lohe, 68 Oh. St. 101, 67 N. E. 161 (1903), the court said: "For an injury received by a passenger on a steam railroad by reason of a collision or derailment while standing upon the platform, in violation of the known rules of the company, there being vacant seats in the car, there can be no recovery against the railroad company. The authorities as to this seem to be uniform. Railroad v. Miles, 40 Ark. 298, 48 Am. Rep. 10; Hickey v. Railroad Co., 14 Allen, 429; Railroad Co. v. Thomas' Adm'r, 79 Ky. 160, 42 Am. Rep. 208; Railroad Co. v. Moneyhun, 146 Ind. 147, 44 N. E. 1106, 34 L. R. A. 141; Palmer v. Pennsylvania Co., 111 N. Y. 488, 18 N. E. 859, 2 L. R. A. 252; Wills v. Railroad Co., 129 Mass. 351."

out, "All out, Jersey City; last stop." The plaintiff then got up and began to get ready to leave the train. He had been sitting a long time without standing. He straightened his limbs, smoothed his clothing, looked at his watch, and then put on his overcoat, after which he picked up his umbrella and bag, and started towards the door. The conductor or guard stood facing the door of the vestibule, which had not as yet been opened. The plaintiff then leaned against a partition, and stood waiting for half a minute, during which time the train was still in motion, but moving smoothly and without any jar or jerks. The guard then opened the vestibule door, and stepped across to the vestibule of the other car. At this the plaintiff, supposing the train had stopped, stepped out into the vestibule, took the rail with his right hand, and passed down the steps, and thence off onto the platform. As he did so he fell, and both feet were crushed, one above the ankle and the other across the toes. It appears that he stepped from the train while it was in motion and was just entering the depot shed. He was unable to describe just the manner in which his feet were crushed, but it is supposed that they were run over by the wheels of the car. There was a light in the vestibule of the car, and the plaintiff saw the steps, three in number, as he passed down from the vestibule, but did not see the ground. The guard was partially facing him as the plaintiff passed out of the car into the vestibule, but gave him no warning or intimation that the car had not stopped.

Upon these facts the trial court dismissed the complaint, and we think properly. In the case of Solomon v. Railway Co., 103 N. Y. 437, 442, 9 N. E. 432, ANDREWS, J., in delivering the opinion of the court, says: "It is, we think, the general rule of law, established by the decisions in this and other states, as claimed by the learned counsel for the respondent, that the boarding or alighting from a moving train is presumably and generally a negligent act *per se;* and that in order to rebut this presumption, and justify a recovery for an injury sustained in getting on or off a moving train, it must appear that the passenger was, by the act of the defendant, put to an election between alternative dangers, or that something was done or said, or that some direction was given to the passenger by those in charge of the train, or some situation created, which interfered to some extent with his free agency, and was calculated to divert his attention from the danger, and create a confidence that

the attempt could be made in safety." Applying this rule to the facts under consideration, it is evident that there is a total absence of any act or direction of those having the charge of the train which interfered with the free agency of the plaintiff, or that in any manner diverted his attention. All that was done by the guard was to call out, "All out, Jersey City; last stop." This notice was given before the train had stopped, and this fact was well understood by the plaintiff. He knew it to be the usual notice given in advance of the arrival of the train at its stopping place, notifying the passengers that the train was nearing the station, in order that they might get ready to alight. He acted upon the notice leisurely, preparing himself to leave the train, gathering together his belongings, and then walked towards the front of the car, stopping and leaning against a partition for a time, waiting unquestionably for the train to arrive at and enter the station. No unusual situation was created. He was in no manner interfered with. As the car was entering the train house the guard stepped into the vestibule, and opened the door. He then stepped into the vestibule in front as the plaintiff stepped out and descended the steps. There was nothing unusual in this. Nothing had been done or said that would lead the guard to suppose that the plaintiff did not understand the situation or that he was mistaken about the train having come to a stand. Ordinarily, passengers have no difficulty in determining whether a train has stopped. They are usually as sensitive to a moving car as any guard or conductor could be, and heretofore it has never been understood to be the duty of a railroad company to expressly warn its passengers of the starting or of the stopping of the train. This was not a rapid-transit or elevated railroad, in which a different custom may prevail. If such a duty is now imposed upon railroad companies, their burden will be materially increased, and they cannot properly open the door of a car for the exit of passengers until it has actually come to a stop. No case to which our attention has been called has gone to this extent. In the Filer Case, 49 N. Y. 47, the plaintiff, a woman, was directed by the brakeman to get off the car while it was in motion, telling her that the car would not stop at the station or move more slowly. She was thus put to an election between two alternatives, either to be carried on beyond her destination, or else to take the chance of injury by alighting while the car was in motion; thus bringing the case within the exception to the rule given by ANDREWS, J. in the Solomon Case. In the Bucher Case, 98 N. Y.

128, the train did not stop at the station for which the plaintiff had purchased his ticket and at which he had the right to get off. The train merely slowed up, and did not furnish an opportunity to leave the cars in accordance with the plaintiff's contract. He was told by the conductor to step off or jump off. He obeyed, and was injured. Here also was a situation presented in which the plaintiff was called upon to elect between alternatives as in the Filer Case, in addition to a command from the conductor by which he was given to understand that he could alight in safety. In the Lent Case, 120 N. Y. 467, 24 N. E. 653, the plaintiff had entered a car in which the seats were all occupied. She passed through to the rear platform, and was informed by the conductor that another car would be put on. An empty car was backed down, and came in contact with the platform of the car on which she was standing. The conductor cried out, "All aboard," but the drawheads of the two cars failed to catch, and in consequence the car receded several feet, and as the plaintiff attempted to pass forward into the vacant car she fell between the two, and was injured. In this case the plaintiff was clearly misled by the statements of the conductor. She had been informed that an empty car was to be attached. It was backed down so that the platforms of the two cars came together. The conductor gave his notice, "All aboard," from which she was induced to believe that she could pass from the platform of the car on which she was standing to that in the rear in safety. In the Lewis Case, 145 N. Y. 508, 40 N. E. 248, the plaintiff desired to leave the car at a station at which the train did not stop. He was advised by the conductor that before reaching the station the train would slow up near a bridge to enable a freight train, approaching on another track, to pass. The conductor told him to get off there. He went to the rear of the car to alight, and was thrown from the car by a jerk, causing him to fall upon another track, on which the freight train was passing. Here, also, we find a situation presented very similar to the Filer and Bucher Cases. See, also, Laffin v. Railroad Co., 106 N. Y. 136, 12 N. E. 599; Hunter v. Railroad Co., 126 N. Y. 18, 26 N. E. 958, 12 L. R. A. 429; Piper v. Railroad Co., 156 N. Y. 224, 50 N. E. 851, 41 L. R. A. 724; Distler v. Railroad Co., 151 N. Y. 424, 45 N. E. 937, 35 L. R. A. 762; and England v. Railroad Co., 153 Mass. 490, 27 N. E. 1.

The order of the Appellate Division should be reversed, and judgment entered upon the nonsuit affirmed, with costs.[1]

PENNSYLVANIA CO. v. LANGENDORFF.

(48 Ohio St. 316.—1891.)

BRADBURY, J. The defendant in error, in June, 1885, while passing along one of the streets in East Toledo, stopped at a point where the track of the railway of plaintiff in error crossed the street, and engaged in conversation with a woman who had in charge two children, one an infant in arms, the other a girl about four years old. The plaintiff in error had constructed a safety-gate at this point, and during the greater part of the day kept there a watchman to close the same when trains were approaching, as a warning to travelers. The accident that caused the injury occurred about 7 o'clock in the evening, or a little later, but while it was yet light. The watchman had finished his day's labor, and gone away, and the gate was raised, (or open), though the street was, perhaps, as extensively used at that hour as at any other part of the day. A local freight train was past due, and approaching at a higher rate of speed than that prescribed by the ordinances of the city. The defendant in error and the nurse were engaged in conversation at a point from which the approaching train was in view for a considerable distance, though exactly how far away it could be seen is left in some

[1] See Jones v. Canal & C. Ry. 109 La. 218, 33 So. 200. (1902): "When, therefore, a person attempts to step off from a car that is barely moving, his attempt will not, of itself, constitute such negligence as will prevent his recovery for an injury caused by a sudden jerk of the car which throws him to the ground. Railway Co. v. Mumford, 97 Ill. 560, 38 L. R. A. 787, note. But, while it may now be considered settled that it is not negligence, as a matter of law, to step off from a moving street car (Ober v. Railroad Co., 44 La. Ann. 1059, 11 South. 818, 32 Am. St. Rep. 366), a person stepping off from such car takes upon himself, in the absence of negligence or fault on part of the carrier, the risk of injury. See Jagger v. Railway Co., 180 Pa. 436, 36 Atl. 867, 38 L. R. A. 786, with note and brief of numerous authorities. And if there be no negligence on part of the carrier, there can be no recovery, although the act of the plaintiff may not have been negligent. Ricketts v. Railway Co., 85 Ala. 600, 5 South, 353; McDonald v. Railway Co., 110 Ala. 161, 20 South. 317, 38 L. R. A. 787, note."

doubt. The little girl, while her nurse and defendant in error were conversing, wandered across the railroad track, and, seeing or hearing the approaching train, became excited by the sight or noise or both, and by clapping her hands and other manifestations of surprise and delight, attracted the attention of her nurse certainly, and, probably, that of the defendant in error also. The nurse excitedly called the child to her, and while crossing the railroad track in obedience to the call it tripped and fell in front of the rapidly approaching train, whereupon the defendant in error, observing its imminent peril, sprang to its rescue, caught it in his arms, and leaped onward, but was struck by the locomotive before he could pass beyond its reach, and received the injuries of which he complains. That the safety-gate was raised, and the watchman absent, was not disputed at the trial, so far as the record discloses; and the evidence is amply sufficient to warrant the jury in finding that the train was being run at an unlawful rate of speed, so that in both these particulars the negligence of the railroad company was established. * * *

This brings us to the consideration of the main question. Plaintiff in error contends that it was negligence *per se* for the defendant in error to throw himself in front of a moving train in his effort to rescue the child from danger. The petition of the plaintiff below discloses that he received the injury of which he complained by voluntarily passing in front of a moving train to rescue a child who had fallen in front of it; therefore, if such an act is negligence *per se*, the petition disclosed that the negligence of the plaintiff below contributed to the injury, and he was not entitled to maintain an action therefor. The same question was raised by an exception taken to the following part of the charge of the court: "It appears that the plaintiff was struck by the engine and injured while in the act of passing across the track and rescuing a little child from danger and saving its life. To hold the railroad company responsible in damages for this injury it must be shown (1) that the child was in danger of being run over and injured by the approaching engine, and that such danger was caused or created by the negligence of the railroad company; and (2) that in making the effort to rescue the child the plaintiff was not guilty of contributory negligence. These are questions of fact which it will be your duty to determine from the evidence. * * * If you find that the peril to which the child was exposed was caused by such negligence of the company, you will then inquire whether the plaintiff, in passing across the track

and attempting to rescue the child, was guilty of contributory negligence. The law will not impute negligence to an effort to preserve human life, unless made under such circumstances as to constitute rashness in the judgment of prudent persons. * * * If he believed, and had good reason to believe, that he could save the life of the child without serious injury to himself, the law will not impute to him blame for making the effort." Plaintiff in error insists that the court of common pleas, instead of leaving the question, as it did, to the jury, to say whether the act of the defendant in error, under all the circumstances, and according to the rules laid down by the court, was or was not negligent, should have told them that to pass in front of a rapidly moving train, as it was admitted the defendant in error did, even to rescue from danger a child of tender years, was in law an act of negligence that defeated his right of recovery. It is said that the defendant in error voluntarily assumed the risk, that the danger attending his act was apparent; and that, however commendable his conduct may have been when viewed from the standpoint of humanity, the law will grant no relief for an injury thus brought upon himself. It is apparent that the defendant in error was under no legal obligation to rescue the child. If he had chosen to stand by and permit the approaching train to run over and kill the child, he would have violated no rule of law, civil or criminal. Therefore what he did in the matter was a voluntary act in the sense of that term that he was under no legal obligation to perform it. That, however, is not a conclusive test of the question. To entitle one to relief for the consequences of the negligence of another it is by no means necessary that the party injured should have been at the time in the discharge of any duty whatever. His rights in this respect are perfect when he is in the performance of any lawful act, and even, in some instances and in some States, when the act is in some respects not strictly lawful. The act of the defendant in error was not only lawful, but it was highly commendable; nor was he in any legal sense responsible for the emergency that called for such prompt decision and rapid execution. The negligence of the railroad company in having no watchman at this public crossing, and the unlawful rate of speed at which the train was running towards it, to which may, perhaps, be added that of the nurse in charge of the child, were the causes of its extreme danger. There was but the fraction of a minute in which to resolve and act, or action would come too late. Under these circumstances it would be unreasonable

to require a deliberate judgment from one in a position to afford relief. To require one so situated to stop and weigh the danger to himself of an attempt to rescue another, and compare it with that overhanging the person to be rescued, would be in effect to deny the right of rescue altogether if the danger was imminent. The attendant circumstances must be regarded; the alarm, the excitement, and confusion usually present on such occasions; the uncertainty as to the proper move to be made; the promptness required; and the liability to mistake as to what is best to be done suggests that much latitude of judgment should be allowed to those who are thus forced by the strongest dictates of humanity to decide and act in sudden emergencies. And the doctrine that one who, under those or similar circumstances, springs to the rescue of another, thereby encountering even great danger to himself, is guilty of negligence *per se,* is neither supported by principle nor authority.

In Railway Co. v. Hiatt, 17 Ind. 102, language is used by the judge in deciding the case, which, to some extent, supports the doctrine, but the decision was not placed upon that ground, and what the learned judge said in that connection may be regarded as *obiter dictum.* The doctrine is repudiated by the text-writers and all the other cases that come to our notice. In Eckert v. Railway Co., 43 N. Y. 502, it was held that " the law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under circumstances constituting rashness in the judgment of prudent persons." In that case the rescuer lost his life in throwing a small child from the track of an approaching train, and a judgment in favor of his administrator for damages resulting from his death was affirmed by the court of appeals. The resemblance between that case and the one before us is very striking. This doctrine has received the sanction of the courts of last resort in Massachusetts and Missouri. Linnehan v. Sampson, 126 Mass. 506; Donahoe v. Railway Co., 83 Mo. 560; Beach, Contrib. Neg. § 15, p. 45; Whart. Neg. § 314; Pierce on Railroads, 329. The doctrine that one is not necessarily chargeable with contributory negligence because he adopted a course of action that imperiled his safety, or even his life, finds support in other courts. Carroll v. Railroad Co., 14 Minn. 57; Penn. Co. v. Roney, 89 Ind. 453; Cottrill v. Railway Co., 47 Wis. 634. We think the court of common pleas did not err in leaving it to the jury to determine from all the circumstances surrounding the defendant in error at the time he sprang to the res-

cue whether the act was rash or not, and in saying to them that, if they found it was not rash, then it did not constitute contributory negligence. It is difficult, if not impossible, to lay down in advance a rule by which to determine the extent to which one may risk his safety or his life in emergencies of this character, and not be charged with rashness; but the emergency may be such as to warrant the assumption of a high degree of risk, and one so situated may rightfully expect his acts to be construed in the light afforded by all the circumstances that impelled him to their commission, and that he would not be charged with contributing to his own injury, so as to defeat a right of action, because the result showed that the risk he assumed was greater than in the excitement of the moment he had contemplated, or in some other respect his judgment had been faulty.

Judgment affirmed.

EVANS v. JOSEPHINE MILLS.

(119 Ga. 448; 46 S. E. 674.—1904)

LAMAR, J. * * * The amendment, however, further alleged that, though the machine was not in motion when the plaintiff put her hand between the rollers, another "little girl" started it up, with the result that serious personal injuries were inflicted upon the plaintiff. On this theory: (1) If the master, or some one for whose act he was responsible, was not negligent, she cannot recover. (2) This not being a suit against a railroad company, if the master was negligent, the plaintiff's contributory negligence might lessen, though under our statute it does not necessarily defeat, a recovery. Civ. Code 1895, § 3830. (3) If the plaintiff was free from fault, and was injured by a fellow servant, she cannot recover, unless the fact that she was a minor under the age of 14 takes her without the operation of the fellow-servants rule.[1] There are cases which hold

[1] The plaintiff was between eleven and twelve, and was a "bright, smart child, who had worked in defendants' mill for some time."

In Parker v. St. Ry., 207 Pa. 438, 441, 56 At. 1001 (1903) the court held that "the standard of responsibility is the average capacity of others of the same age and experience, and to this standard a child should be held, in the absence of evidence on the subject."

that this doctrine is applicable to infants. Shields v. Yonge, 15 Ga. 349, 60 Am. Dec. 698 (18); King v. Boston, etc., Co., 9 Cush. 112 (17); Curran v. Merchants' Mfg. Co., 130 Mass. 374, 39 Am. Rep. 457 (between 14 and 15); Fones v. Phillips, 39 Ark. 23, 43 Am. Rep. 264 (nearly 14); Brown v. Maxwell, 6 Hill, 592, 41 Am. Dec. 771; Greenwald v. Marquette, H. & O. Ry. Co., 49 Mich. 197, 13 N. W. 513 (17); Pittsburgh, C. & St. L. Ry. Co. v. Adam, 105 Ind. 153, 5 N. E. 187 (under 21); Gartland v. Toledo Co., 67 Ill. 498 (under 21); Fisk v. Central Pacific R. Co., 72 Cal. 38, 13 Pac. 144, 1 Am. St. Rep. 22 (12); Lovell v. De Bardlaben Co., 90 Ala. 15, 7 South. 756 (where the court construed the declaration to mean that plaintiff was over 14); Hefferen v. Northern P. R. Co., 45 Minn. 471, 48 N. W. 1, 526 (17); Smillie v. St. Bernard Dollar Store, 47 Mo. App. 404 (10); Craven v. Smith, 89 Wis. 125, 61 N. W. 317 (11).

In other cases it has been held that the doctrine exempting the master from liability to one servant for injuries inflicted by the negligence of a fellow servant is based upon the theory that such risks are among those assumed in the contract of employment, and that, "if the injured employee is a child incapable of comprehending that risk, the rule ought not to apply." Hinckley v. Horazdowsky, 133 Ill. 359, 24 N. E. 421, 8 L. R. A. 490, 23 Am. St. Rep. 618. In Houston & G. N. R. Co. v. Miller, 51 Tex. 270, the court held that, while the fellow-servant rule should apply to one under 21 years of age, it should not be enforced against a child of tender years. See, also, Evans v. American Iron Co. (C. C.) 42 Fed. 519. Compare So. Agricultural Works v. Franklin, 111 Ga. 319, 323, 36 S. E. 693. From the dissenting opinion in Atlanta Co. v. Speer, 69 Ga. 158, 47 Am. Rep. 750, and from the foregoing cases, it will be seen that all the authorities hold that the fellow-servant rule applies to infants over the age of 14. As to those under that age there is a conflict. Some authorities, for cogent reasons, hold that the doctrine is not applicable to infants of tender years. And, without noting the distinction between those over and those under 14, such is the clear intimation in Augusta Factory v. Barnes, 72 Ga. 217, 53 Am. Rep. 838.

All children are chargeable with the result of failing to exercise the due care which their physical and mental capacity fits them for exercising. Civ. Code 1895, § 2901. They are daily brought into the presence of known dangers which they may be reasonably ex-

pected to avoid. But the risk from the negligence of fellow servants, which, as matter of law, is presumed to be assumed in the contract of employment, is the risk of an unknown, contingent, and legal danger, which would make no impression upon the mind of a child of tender years. It is not like a peril obvious to the senses, the very presence of which awakens apprehension, and, when coupled with the fear of pain, is calculated to make the infant avoid it. Nor is it like the responsibility for the violation of a criminal statute, where the minor is to be punished for what it itself does, and where the implied knowledge of the criminal statute is generally aided by the child's conscience and intuitive knowledge that the act is in itself wrong. Pen. Code 1895, § 33. The line must be drawn somewhere, and, with variation below that age depending on its capacity, the time of responsibility has been absolutely fixed at 14. For some purposes after reaching that age infants are classed as adults. They can then make wills (Civ. Code 1895, § 3265); select their guardians (Civ. Code 1895, § 2516); and females can contract marriage (Civ. Code 1895, § 2412). They then become amenable to the criminal law, and, by analogy, are presumed to assume the risks which the law makes incident to their contract of employment. But under that age, while they may be charged with the duty of avoiding dangers of which they know, there is no presumption that they contract to assume the risks which are not patent, of which they do not know, and which relate to the contingent act of a third person. The plaintiff proved her case substantially as laid in the amended petition, and, under the circumstances, a nonsuit should not have been granted; but the matter should have been referred to the jury, to determine whether the fellow servant, in starting the machine, was guilty of an act of negligence in relation to the plaintiff.

Judgment reversed. All the Justices concurring.

§ 4. IMPUTED NEGLIGENCE.

CHICAGO, B. & Q. R. CO. v. HONEY.

(68 Fed. 39: 12 C. C. A. 190.—1894.)

THAYER, District Judge. The question presented by this record and to be decided is accurately stated by counsel for the plaintiff in error, as follows:

"In an action brought by the husband against a third party for damages for the loss of the society of his wife, her aid, and surgical attendance, consequent upon physical injuries received by the wife, is the fact that the wife has been guilty of contributory negligence, and the injuries which she received being the result of the concurring negligence of the wife and the third party, a defense?"

The circuit court answered this question in the negative, holding in effect that the contributory fault of the wife could not be imputed to the husband, and preclude him from recovering, either on the ground that she was acting as his agent or servant at the time of the injury, or because of the existence of the marital relation. The learned judge of the trial court appears to have been of the opinion that a husband suing for the loss of the service of his wife, and for medical expenses, occasioned by the negligence of a third party, is, in the state of Iowa at least, unaffected by the fact that the wife was guilty of contributory negligence, because the laws of that state have abolished the legal fiction of the identity of husband and wife, and have exempted the husband from responsibility for the negligences and misfeasances of the wife. Vide 59 Fed. 423. It becomes necessary, therefore, to determine whether this view is tenable. Whenever thte question has heretofore been considered, it seems to have been taken for granted that the relation existing between husband and wife or parent and child is of such character that the plea of contributory negligence on the part of the wife or child, if the latter is of sufficient age and intelligence to be chargeable with negligence, is a good defense, when the husband or parent brings a common-law action to recover for the loss of service or for medical expenses consequent upon physical injuries sustained by the wife or child through the concurring fault of another. The following are

some of the cases, and doubtless there are others, where this principle has been recognized and enforced: Railroad Co. v. Terry, 8 Ohio St. 570; Dietrich v. Railway Co., 58 Md. 347; Benton v. Railway Co., 55 Iowa, 496, 8 N. W. 330; Iron Co. v. Brawley (Ala.) 3 South. 555; Gilligan v. Railroad Co., 1 E. D. Smith, 453. In none of the cases last cited was the reason of the rule stated, nor was the subject much discussed. It seems to have been taken for granted that the concurring negligence of the injured party was a sufficient defense to a suit by the husband or parent, when suing merely for a loss of the services of the injured party, or for medical expenses incurred and paid by him in the discharge of his obligation as husband or parent. But the weight to be given to these decisions as authority is not impaired by the fact that the rule stated and applied was not much discussed. On the contrary, the fact that the doctrine applied to the decision of the cases in question was assumed to be correct both by court and counsel, may be taken as an expression of the general understanding of the profession that the doctrine is well established and founded in reason. If we look for the true foundation of the rule in question, we apprehend that it will not be difficult to find. When one person occupies such a relation to another rational human being that he is legally entitled to her society and services, and to maintain a suit for the deprivation thereof, he should not be permitted to recover in such an action if the loss was occasioned by the concurring negligence of the person on whose account the right of action is given. If the person from whom the right of service and society is derived is capable of taking ordinary precautions to insure her own safety, and the person to whom the right of service belongs suffers her to go abroad unattended, and to exercise her own faculties of self-preservation, it is no more than reasonable to hold him responsible, in a suit for loss of society and service, for the manner in which such faculties have been exercised. We can conceive of no greater reason for deciding, in a case of this character, that a husband is not accountable for the conduct of his wife in caring for the safety of her own person, than there would be for holding that he was not chargeable with her contributory negligence in the management of a horse and carriage belonging to the husband, which she had been permitted to use for her own pleasure and convenience. In either case the fact that the husband has permitted the wife to control her own movements and to provide for her own safety, upon the evident assumption that she is competent

to do so, should preclude him from asserting, in a suit against a third party for loss of service or society or for a loss of property, that he is not responsible for her contributory fault whereby the loss was occasioned. In this connection it is worthy of notice that in the state of Iowa, where this case originated, and in some other states as well, it is held that the husband's contributory fault is imputable to the wife in a suit brought by her against a third party for injuries sustained through the concurrent negligence of such third party and her husband. By the Iowa courts, it is said that the husband's negligence is imputable to the wife under such circumstances, because of the marital relation which entitles her to his care and protection. Yahn v. City of Ottumwa, 60 Iowa, 429, 15 N. W. 257, as explained in Nisbit v. Town of Garner, 75 Iowa, 314, 317, 39 N. W. 516; Peck v. Railroad Co., 50 Conn. 379; Carlisle v. Sheldon, 38 Vt. 440, 447. In other jurisdictions it has been decided that the husband's contributory negligence is not thus imputable to the wife when she sues in her own right for injuries sustained under the circumstances last mentioned. Shaw v. Craft, 37 Fed. 317; Sheffield v. Telephone Co., 36 Fed. 164; Flori v. City of St. Louis, 3 Mo. App. 231, 240; Railway Co. v. Creek (Ind. Sup.) 29 N. E. 481.

We do not regard it as material to the decision of the case at bar to determine what the true doctrine is with reference to the point last mentioned, for, even if we should concede it to be the better view that the husband's contributory negligence is not imputable to the wife when she sues in her own right for an injury sustained, still we think that it would not be a reasonable deduction from this rule that the husband is likewise unaffected by the wife's negligence when he sues for loss of services and medical expenses; for when the wife brings an action for personal injuries which she has sustained, the right of action is in no wise dependent upon the marital relation. She does not derive her right to sue from that relation, but brings suit like any other person for an injury sustained through the fault of another. At common law it was necessary for the wife to be joined as plaintiff in such a suit, because she was regarded as the meritorious cause of action. Bing. Inf. & Cov. (Am. Ed.) 247, and cases there cited. But on the other hand, the husband's right to sue for loss of society and services grows out of the marital relation, and is incident to the rights thereby acquired. It has its origin in the existence of a valid marriage, which relation entitles him to the benefit of the wife's services and society, and which also imposes

on him the duty of providing her with medical attendance in case of sickness or accident. When the husband loses the services of his wife, or is compelled to incur medical expenses, through the fault of another, then he may sue the wrongdoer. The right of action is incident to the marriage relation, and cannot exist without it. We think, therefore, that, even if it is the better view that the husband's contributory negligence cannot be imputed to the wife when she sues for her own injuries, yet that when the husband brings an action for the loss of society and services, which loss was due to the contributory fault of the wife, her want of ordinary care should nevertheless be imputed to the husband on the grounds heretofore indicated. As the respective rights of action are predicated on different grounds,—the one growing out of the marriage relation, and the other existing entirely independent of that relation,—there is no logical difficulty in holding the husband accountable for the contributory negligence of the wife, although the latter is not responsible for the contributory fault of her husband.[1]

[1] In Bailey v. City of Centerville, 115 Ia. 271; 88 N. W. 380 (1901). "The plaintiff and her husband were together on the walk at the time of the accident, returning home from church; and he stepped upon the end of a loose board, which flew up and tripped her. The defendant asked instructions to the effect that, if the husband was negligent, the plaintiff could not recover. In Yahn v. City of Ottumwa, 60 Iowa, 429, 15 N. W. 257, a recovery by the wife, who was injured by the negligent driving of her husband, was denied. In Nesbit v. Town of Garner, 75 Iowa, 314, 39 N. W. 516, 1 L. R. A. 152, 9 Am. St. Rep. 486, it is said that the holding in the Yahn Case is based upon the thought that the wife was under the care of the husband, and was distinguishable from the case then under consideration for that reason. * * * It is not necessary to further discuss the authorities on this point. It is enough to say that the facts in this case do not bring it within the rule announced in Yahn v. City of Ottumwa, even if that case is to be considered an authority at this time, for it cannot be said that the plaintiff was so in the care of her husband while they were passing along this sidewalk together that she should be bound by his acts. Nor can it be said that they were engaged in a common enterprise simply because they were returning from church together. They were strangers, so far as this transaction was concerned. Barnes v. Town of Marcus, 96 Iowa, 677, 65 N. W. 984."

CHAPMAN v. N. H. RY. CO.

(19 N. Y. 341.—1859.)

JOHNSON, Ch. J. The collision from which the plaintiff's injury resulted, occurred on the track of the New York and Harlem Railroad Company, between a train of that company and a train of the defendants. The plaintiff was a passenger in the Harlem train, which ran into the defendant's train, both being in motion towards New York. There was evidence of negligence in the management of each train, and the position on which the defendants rely is, that such negligence on the part of the Harlem train, as would preclude that company from an action against the defendants, will also preclude the plaintiff from sustaining his action. The general rule is, that one who receives an injury from the negligence of another may maintain an action for his damages. Upon this rule a natural and reasonable exception has been engrafted, that if the injured party, by his own negligence, has contributed to the injury, he cannot maintain an action, unless the negligence of the other party has been so gross in its character as to be equivalent in law to a willful injuring. I do not think this exception, or any reasonable extension of it, can be applicable to the plaintiff. He was a passenger on the Harlem cars, conducting himself as he lawfully ought, having no control over the train or its management; on the contrary, bound to submit to the regulations of the company and the directions of their officers. To say that he is chargeable with negligence because they have been guilty, is plainly not founded on any fact of conduct on his part, but is mere fiction. The doctrine contended for is stated and, in a measure sustained, by the decision in Thorogood v. Bryan, 8 Common Bench R. 115. That was an action by a passenger in an omnibus against the proprietors of another omnibus, by which the plaintiff was injured. Wishing to alight he did not wait for the omnibus to draw up to the side of the street, but got out while it was in motion, and far enough from the footpath to allow another carriage to pass between it and the path. The other omnibus coming up ran over him. The jury were told that if they thought want of care on the plaintiff's part, or on the part of the driver in not drawing up to the side of the street to put the plaintiff down, had

been conducive to the injury, no recovery could be had. Before the decision of this case, Catlin v. Hills, 8 id. 123, was argued, an action by a passenger on a steamboat against the proprietors of another steamboat, between which a negligent collision took place, whereby the passenger was injured. In the course of these discussions, Bridge v. Grand Junction Railway Company, 3 Mees. & Wells, 244, was also considered, in which the doctrine in question seems to have originated. Judgment was not given in Catlin v. Hills, an arrangement between the parties having taken place, but in the first case mentioned the ruling at the trial was maintained. It seems to have been put on the ground that the plaintiff, having voluntarily trusted himself on the omnibus, had so identified himself with its management that the driver's negligence would deprive him of any right to an action against the owners of the other vehicle. Upon the facts of that case, where the driver's negligence consisted only in his not preventing the plaintiff from getting out until he had drawn up to the footpath, there was great room to say that it was as much attributable to the plaintiff as to the driver. But I do not see the justice of the doctrine in connection with the case before us. It is entirely plain that the plaintiff had no control, no management, even no advisory power, over the train on which he was riding. Even as to selection, he had only the choice of going by that railroad or by none. To attribute to him, therefore, the negligence of the agents of the company, and thus bar him of a right of recovery, is not applying any existing exception to the general rule of law, but is framing a new exception which does not in fact rest upon the reason of the original exception, and is based on fiction, and inconsistent with justice.

The judgment should be affirmed.

CUNNINGHAM v. CITY OF THIEF RIVER FALLS.

(84 Minn. 21 : 86 N. W. 763.—1901.)

BROWN, J. * * * 2. The court refused defendants' second request, which was substantially to the effect that if the jury found from the evidence that the defect in the street could be passed safely by a person driving with ordinary care and prudence in a reason-

ably safe vehicle, and that the vehicle in which plaintiff was riding was defective and unsafe, and that the team was not driven in a careful manner, and that by reason of which defective vehicle and improper driving the plaintiff was thrown to the ground and injured, she cannot recover; and, further, that a person driving on a highway is required to use a reasonably safe vehicle, and that a municipality is not required to anticipate the use of one that is defective. The latter part of the request was given in the general charge of the court, and we think, conceding the other portions to be pertinent to the case, that they are sufficiently covered, and it was no error to refuse the request. One objection to the proposed instruction is that it is somewhat involved, and would tend more to confuse the jury than to enlighten them. But, for the reasons suggested with reference to the first request, it was properly refused. It is not claimed that plaintiff was driving the team; nor is there any evidence that she had control over, or was in any way responsible for the conduct of, the driver. The request involves the question whether plaintiff and her companions were jointly responsible for the management and control of the team. If they were, the negligence of Alexander, the driver, if his negligence be conceded, was imputable to plaintiff, and she cannot recover. Counsel for appellant contended on the argument that whether the parties were engaged in a joint enterprise was, under the evidence, a question of law for the court, and he urged that the evidence is conclusive that they were so engaged. We concur with him that, under the evidence, the question is one of law, but determine it adversely to his contention. Parties cannot be said to be engaged in a joint enterprise, within the meaning of the law of negligence, unless there be a community of interest in the objects or purposes of the undertaking, and an equal right to direct and govern the movements and conduct of each other with respect thereto. Each must have some voice and right to be heard in its control and management. Town of Knightstown v. Musgrove, 116 Ind. 121, 18 N. E. 452; Beach, Contrib. Neg. (3d Ed.) § 115a. The plaintiff in this action was in no way connected or interested in the affairs of Alexander, or in the purposes of his visit to Thief River Falls. She did not own the team or wagon in which they were riding, nor have any control over the driver. She was a member of the party by invitation only, and for purposes purely personal to herself. The evidence is quite clear that the parties were not engaged in a joint enterprise, within

the meaning of the law of negligence. The case at bar is very similar to Finley v. Railway Co., 71 Minn. 471, 74 N. W. 174. In that case it appeared that the plaintiff, a married woman, was riding with her husband, at his invitation, in his wagon, drawn by horses which he was driving. She had no control over the husband with respect to the management of the team, nor was he her servant or agent. It was conceded in that case, for the purposes of the decision, that the husband was guilty of negligence in driving upon the railroad track without looking and listening for an approaching train, but it was distinctly held that his negligence was not imputable to her. If any distinction can be made between that case and the one at bar, we are unable to point it out. Here, as there, the plaintiff was an occupant of the wagon by invitation. The driver was not her agent or servant, or in any way under her control; and it may be conceded that he failed to exercise ordinary care in driving across the railroad track, and that his negligence contributed to cause plaintiff's injury; still, within the rule of the Finley Case, his negligence cannot be imputed to her. Howe v. Railway Co., 62 Minn. 71, 64 N. W. 102, 30 L. R. A. 684; Lammers v. Railway Co. (Minn.) 84 N. W. 728; Follman v. City of Mankato, 35 Minn. 523, 29 N. W. 317; Wosika v. Railway Co. (Minn.) 83 N. W. 386. It does not, however, necessarily follow in such cases that because the negligence of the driver is not imputable to other occupants of the vehicle, because not jointly engaged with him, such other occupants may not be guilty of contributory negligence. A failure on their part to exercise reasonable and ordinary care to avoid the injury would constitute negligence which would prevent a recovery. Undoubtedly, if they were cognizant of the danger resulting in their injury, and failed to call the driver's attention to it, but permitted him to drive recklessly into it without protest on their part, no recovery could be had. Brickell v. Railroad Co., 120 N. Y. 290, 24 N. E. 449; Beach, Contrib. Neg. (3d Ed.) § 115. But the evidence is not such as to justify the conclusion, as a matter of law, that she was chargeable with independent contributory negligence. It is not claimed that she was familiar with the condition of the street, and whether she was guilty of contributory negligence because of a knowledge that the wagon seat was unfastened, and thus defective, was properly submitted to the jury. She was not negligent, as a matter of law, even if it be conceded that she had full knowledge of this defect. The question was one of fact for the jury. Malloy v.

Walker Tp., 77 Mich. 448, 43 N. W. 1012, 6 L. R. A. 695; Jennings v. Town of Albion (Wis.) 62 N. W. 926.[1]

NEWMAN v. PHILLIPSBURG H. C. RY. CO.

(52 N. J. L. 446.—1890.)

BEASLEY, J. There is but a single question presented by this case, and that question plainly stands among the vexed questions of the law. The problem is, whether an infant of tender years can be vicariously negligent, so as to deprive itself of a remedy that it would otherwise be entitled to. In some of the American States this question has been answered by the courts in the affirmative, and in others in the negative. To the former of these classes belongs the decision in Hatfield v. Rofer & Newell, reported in 21 Wend. 615. This case appears to have been one of first impression on this subject, and it is to be regarded, not only as the precursor, but as the parent of all the cases of the same strain that have since appeared.

The inquiry with respect to the effect of the negligence of the custodian of the infant, too young to be intelligent of situations and circumstances, was directly presented for decision in the primary case thus referred to, for the facts were these, viz.: The plaintiff, a child of about two years of age, was standing or sitting in the snow in a public road, and in that situation was run over by a sleigh driven by the defendants. The opinion of the court was, that as the child was permitted by its custodian to wander into a position of such danger it was without remedy for the hurts thus received, unless they were violently inflicted, or were the product of gross carelessness on the part of the defendants. It is obvious that the judicial theory was, that the infant was, through the medium of its custodian, the doer, in part, of its own misfortune, and that, conse-

[1] In Illinois Cen. Ry. v. McLeod 78, Miss. 334; 29, So, 76 (1901), the court held, that, "It is a mistake to suppose that a passenger in an open buggy need not exercise the commonest prudence, the most ordinary care, when the danger of his surroundings is apparent. Ordinary and natural prudence requires him to take some action, and to check or remonstrate with the driver. Dean v. Railroad Co., 129 Pa. St. 514, 18 Atl. 718, 6 L. R. A. 143; Smith v. Railroad Co., 87 Me. 350, 32 Atl. 967; and the other authorities cited in the brief of counsel for appellant."

quently, by force of the well-known rule, under such conditions, he had no right to an action. This, of course, was visiting the child for the neglect of the custodian, and such infliction is justified in the case cited in this wise: "The infant," says the court, "is not *sui juris*. He belongs to another, to whom discretion in the care of his person is exclusively confided. That person is keeper and agent for this purpose; in respect to third persons his act must be deemed that of the infant; his neglects the infant's neglects."

It will be observed that the entire content of this quotation is the statement of a single fact, and a deduction from it, the premise being, that the child must be in the care and charge of an adult, and the inference being that, for that reason, the neglects of the adult are the neglects of the infant. But surely this is, conspicuously, a *non sequitur*. How does the custody of the infant justify, or lead to, the imputation of another's fault to him? The law, natural and civil, puts the infant under the care of the adult, but how can this right to care for and protect be construed into a right to waive, or forfeit, any of the legal rights of the infant? The capacity to make such waiver or forfeiture is not a necessary, or even convenient, incident of this office of the adult, but, on the contrary, is quite inconsistent with it, for the power to protect is the opposite of the power to harm, either by act or omission. In this case in Wendell it is evident that the rule of law enunciated by it is founded in the theory that the custodian of the infant is the agent of the infant; but this is a mere assumption without legal basis, for such custodian is the agent, not of the infant, but of the law. If such supposed agency existed, it would embrace many interests of the infant, and could not be confined to a single instance where an injury is inflicted by the co-operative tort of the guardian. And yet it seems certain that such custodian cannot surrender or impair a single right of any kind that is vested in the child, nor impose any legal burden upon it. If a mother traveling with a child in her arms should agree with a railroad company, that in case of an accident to such infant, by reason of the joint negligence of herself and the company, the latter should not be liable to a suit by the child, such an engagement would be plainly invalid on two grounds; first, the contract would be *contra bonos mores;* and second, because the mother was not the agent of the child, authorized to enter into the agreement. Nevertheless, the position has been deemed defensible that the same evil consequences to the infant will follow from the negligence of the mother in the

absence of such supposed contract, as would have resulted if such contract should have been made and should have been held valid.

In fact, this doctrine of the imputability of the misfeasance of the keeper of a child to the child itself, is deemed to be a pure interpolation into the law, for until the case under criticism it was absolutely unknown; nor is it sustained by legal analogies. Infants have always been the particular objects of the favor and protection of the law. In the language of an ancient authority this doctrine is thus expressed: "The common principle is, that an infant in all things which sound in his benefit shall have favor and preferment in law as well as another man, but shall not be prejudiced by anything in his disadvantage." (9 Vin. Abr. 374.) And it would appear to be plain that nothing could be more to the prejudice of an infant than to convert, by construction of law, the connection between himself and his custodian into an agency to which the harsh rule of *respondeat superior* should be applicable. The answerableness of the principal for the authorized acts of his agent is not so much the dictate of natural justice as of public policy, and has arisen, with some propriety, from the circumstances that the creation of the agency is a voluntary act, and that it can be controlled and ended at the will of its creator. But in the relationship between the infant and its keeper, all these decisive characteristics are wholly wanting. The law imposes the keeper upon the child, who, of course, can neither control nor remove him, and the injustice, therefore, of making the latter responsible, in any measure whatever, for the torts of the former, would seem to be quite evident. Such subjectivity would be hostile, in every respect, to the natural rights of the infant, and, consequently, cannot, with any show of reason, be introduced into that provision which both necessity and law establish for his protection. Nor can it be said that its existence is necessary to give just enforcement to the rights of others. When it happens that both the infant and its custodian have been injured by the cooperative negligence of such custodian and a third party, it seems reasonable, at least in some degree, that the latter should be enabled to say to the custodian, you and I, by our common carelessness, have done this wrong, and, therefore, neither can look to the other for redress; but when such wrongdoer says to the infant, your guardian and I, by our joint misconduct, have brought this loss upon you, consequently you have no right of action against me, but you must look for indemnification to your guardian alone, a proposition is

stated that appears to be without any basis either in good sense or law. The conversion of the infant, who is entirely free from fault, into a wrongdoer, by imputation, is a logical contrivance uncongenial with the spirit of jurisprudence. The sensible and legal doctrine is this: an infant of tender years cannot be charged with negligence; nor can he be so charged with the commission of such fault by substitution, for he is incapable of appointing an agent, the consequence being, that he can, in no case, be considered to be the blamable cause, either in whole or in part, of his own injury. There is no injustice nor hardship in requiring all wrongdoers to be answerable to a person who is incapable either of self-protection or of being a participator in their misfeasance.

Nor is it to be overlooked that the theory here repudiated, if it should be adopted, would go the length of making an infant in its nurse's arms answerable for all the negligences of such nurse while thus employed in its service. Every person so damaged by the careless custodian would be entitled to his action against the infant. If the neglects of the guardian are to be regarded as the neglects of the infant, as was asserted in the New York decision, it would, from logical necessity, follow, that the infant must indemnify those who should be harmed by such neglects. That such a doctrine has never prevailed is conclusively shown by the fact that in the reports there is no indication that such a suit has ever been brought.

It has already been observed that judicial opinion, touching the subject just discussed, is in a state of direct antagonism, and it would, therefore, serve no useful purpose to refer to any of them. It is sufficient to say, that the leading text writers have concluded that the weight of such authority is adverse to the doctrine that an infant can become, in any wise, a tort-feasor by imputation. (1 Shearn. & R. Neg. sec. 75; Whart. Neg. sec. 311; 2 Wood Railw. L. p. 1284.) In our opinion, the weight of reason is in the same scale.

Let the Circuit Court be advised to render judgment on the finding of the jury.[1]

[1] In Del. L. & W. Ry. v. Devore, 114 Fed. 155, 52 C. C. A. 77 (1902), Shipman, Circuit J. said: "The rule of law that the negligence of the parent of a minor who is suing a third person to recover damages for an injury caused by negligence at the time of and which contributed to the injury, and while the minor was under the protection and control of the parent, is imputable

§ 4 (A.)—NEGLIGENCE OF THIRD PARTIES.

SLATER v. MERSEREAU.

(64 N. Y. 138.—1876.)

MILLER, J. The defendant, as a contractor, being in possession and having the control of the premises of Appleton & Co., by the authority of the owners, for the purpose of erecting buildings upon and improving the same, in the performance of his contract possessed the same rights as the owner, and was chargeable for a want of due care and for negligence in the exercise of his rights, if by means thereof the property of the plaintiffs was injured.

The referee found that the water which flowed into the cellar of the building, and injured the plaintiffs, came from the roof by means of the failure of the defendant to make the necessary cuttings in the wall for the waste-pipe which was intended to connect with the sewer, and without which it could not be connected, so that he failed to provide means to carry off the rain-water. That this was negligence on the part of the defendant, and that the water which flowed into the building from Franklin street did so in consequence of the manner in which Moore and Bryant had carried on the erection of the vault and sidewalk in front of said building, and that this was negligence on their part.

He also decided that the defendant was not responsible for the neglect of Moore and Bryant, but as it was impossible to determine in what proportion the water which came from the waste-pipe and that which came from the street contributed to cause the damage, and as all parties in fault were responsible, that the defendant was none the less responsible because Moore and Bryant shared his fault, and he reported in favor of the plaintiffs for the damages sustained. * * * *

The defendant, not being liable for the negligence of Moore and Bryant, as subcontractors, could he be liable for the damages which

to the minor, is now well settled. Lapsley v. Railroad Co. (C. C.) 50 Fed. 181; Id., 2 C. C. A. 149, 51 Fed. 174, 16 L. R. A. 800; Morris v. Railroad Co. (C. C.) 26 Fed. 22; Holly v. Gaslight Co., 8 Gray, 132, 69 Am. Dec. 233; Little v. Hackett, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652." It is opposed however to the weight of modern authorities. See Warren v. Manchester St. Ry. 70 N. H. 352, 47 At. 735 (1900), and cases therein cited.

followed, upon the ground stated by the referee in his report? It is true the defendant and Moore and Bryant were not jointly interested in reference to the separate acts which produced the damages. Although they acted independently of each other, they did act at the same time in causing the damages, etc., each contributing towards it, and although the act of each, alone and of itself, might not have caused the entire injury, under the circumstances presented, there is no good reason why each should not be liable for the damages caused by the different acts of all. The water from both sources commingled together and became one body concentrating at the same locality, soaking through the wall into the plaintiffs' premises and injuring the plaintiffs' property; and it cannot be said that the water which the defendant's negligence caused to flow upon the plaintiff's premises, and which became a portion of all which came there, did not produce the damages complained of. The water with which each of the parties were instrumental in injuring the plaintiffs was one mass and inseparable, and no distinction can be made between the different sources from whence it flowed, so that it can be claimed that each caused a separate and distinct injury for which each one is separately responsible. The case presented is not like that where the animals belonging to several owners do damage together, and it is held that each owner is not separately liable for the acts of all, as there is only a separate trespass or wrong against each. Van Steenburgh v. Tobias, 17 Wend. 562; Auchmuty v. Ham, 1 Den. 495; Partenheimer v. Van Order, 20 Barb. 479. No such division can be made of the separate acts in the case at bar, and it bears some analogy to that of Colgrove v. N. Y. & H. and N. Y. & N. H. R. R. Co., 6 Duer, 382; 20 N. Y. 49, where the injury was caused by concurring negligence in the management of the trains of two railroad companies which came in collision, and the defendants were held jointly liable. The collision was but a single act caused by the separate negligence of different parties, which together produced the result. Here also the contractor and subcontractors were separately negligent, and although such negligence was not concurrent, yet the negligence of both these parties contributed to produce the damages caused at one and the same time. It is no defense for a person against whom negligence which caused damage is proved, to prove that without fault on his part the same damages would have resulted from the act of another (Webster v. H. R. R. R. Co., 38 N. Y. 260); and as the case stands

the referee was justified in holding that the defendant was responsible for the entire damages.

There was no error in the admission or rejection of evidence, and no ground is shown for reversing the judgment.[1]

[1] Cf. Bassett v. City of St. Joseph, 53 Mo. 290; 14 Am. R. 446. The plaintiff, who was kicked by a mule, on striving to escape the kick, jumped into an excavation on the border of the street which, to defendant's knowledge, rendered the street dangerous, was allowed to recover against defendant. *Contra*, Moulton v. Inhabitants of Sanford, 51 Me. 127. See also Mars v. Del. & Hud. C. Co., 54 Hun, 525; Alexander v. Town of New Castle, 115 Ind. 51; Village of Carterville v. Cook, 129 Ill. 152; King v. Troy, 104 N. Y. 344. In Allison v. Hobbs, 96 Me. 26, 51 At. 245, (1901), the court said: "Moreover, these defendants and the assessors for the year 1897, provided the plaintiff was also illegally arrested upon their warrant by the same officer and at the same time, were joint trespassers, although each board of assessors acted independently of each other, and neither had knowledge that the plaintiff was to be arrested upon the warrant of the other. The plaintiff in fact suffered only one wrong,—his illegal arrest and detention by the one person acting under the authority of the two boards of assessors. The trespasses on the person of the plaintiff were simultaneous and contemporaneous acts committed on him by the same person acting at the same time for each of these boards of assessors, and the assessors for both of these years, upon whose warrant the plaintiff was simultaneously arrested, were joint tort feasors. The case of Stone v. Dickinson, 5 Allen, 29, 81 Am. Dec. 727, is directly in point. It is, of course, a familiar rule that, where several persons jointly commit a tort, the person injured has his election to sue all or any of the joint tort feasors, and, in an action against one or more, may recover the damages caused by all jointly.

"Again, while it is true that persons who act separately and independently, each causing a separate and distinct injury, cannot be sued jointly, even though the injuries may have been precisely similar in character and inflicted at the same moment, yet if such persons, acting independently, by their several acts directly contribute to produce a single injury, each being sufficient to have caused the whole, and it is impossible to distinguish the portions of injury caused by each, they are then joint tort feasors, within the rule, and may be sued either jointly or severally, at the election of the plaintiff, and in such an action against one or more the whole damage may be recovered. 15 Enc. Pl. & Prac. 558; Railroad Co. v. Shanly, 107 Mass. 568; Newman v. Fowler, 37 N. J. Law, 89. While this rule may not be applicable to all cases, as, for instance, where domestic animals of different owners jointly contribute in causing the same injury, Van Steenburgh v. Tobias, 17 Wend. 562, 31 Am. Dec. 310, nor, perhaps, to some other cases, we think it is a salutary rule when applied to to such torts as are here complained of." Corey v. Havener, 182 Mass. 250, 65 N. E. 69 (1902); Dufur v. Boston & M. Ry. 75 Vt. 165, 53 At. 1068 (1903), *accord*.

7 Lose things, the natural tendency of which is to do some a nuisance or do mischief, if they escape, the owner keeps at his peril.

§ 5.—LIABILITY OF LANDOWNER OR OCCUPIER; AND OF OTHERS ENGAGED IN EXTRA HAZARDOUS UNDERTAKINGS.

RYLANDS v. FLETCHER.

(L. R. 3 H. L. 330: 37 L. J. Ch. 161.—1868.)

The Lord Chancellor (Lord CAIRNS). My Lords, in this case the plaintiff (I may use the description of the parties in the action) is the occupier of a mine and works under a close of land. The defendants are the owners of a mill in his neighborhood, and they proposed to make a reservoir for the purpose of keeping and storing water to be used about their mill upon another close of land, which, for the purposes of this case, may be taken as being adjoining to the close of the plaintiff, although in point of fact some intervening land lay between the two. Underneath the close of land of the defendants on which they proposed to construct their reservoir there were certain old and disused mining passages and works. There were five vertical shafts and some horizontal shafts communicating with them. The vertical shafts had been filled up with soil and rubbish, and it does not appear that any person was aware of the existence either of the vertical shafts or of the horizontal works communicating with them. In the course of the working by the plaintiff of his mine he had gradually worked through the seams of coal underneath the close, and had come into contact with the old and disused works underneath the close of the defendants.

In that state of things the reservoir of the defendants was constructed. It was constructed by them through the agency and inspection of an engineer and contractor. Personally, the defendants appear to have taken no part in the works, or to have been aware of any want of security connected with them. As regards the engineer and the contractor, we must take it from the case that they did not exercise, as far as they were concerned, that reasonable care and caution which they might have exercised, taking notice, as they appear to have taken notice, of the vertical shafts filled up in the manner which I have mentioned. However, my Lords, when the reservoir was constructed and filled, or partly filled, with water, the weight of the water bearing upon the disused and imperfectly filled-up vertical shafts, broke through those shafts. The water passed

down them and into the horizontal workings, and from the horizontal workings under the close of the defendants it passed on into the workings under the close of the plaintiff, and flooded his mine, causing considerable damage, for which this action was brought.

The Court of Exchequer, when the special case stating the facts to which I have referred was argued, was of opinion that the plaintiff had established no cause of action. The Court of Exchequer Chamber, before which an appeal from this judgment was argued, was of a contrary opinion, and the judges there unanimously arrived at the conclusion that there was a cause of action, and that the plaintiff was entitled to damages.

My Lords, the principles on which this case must be determined appear to me to be extremely simple. The defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so by leaving, or by interposing, some barrier between his close and the close of the defendants in order to have prevented that operation of the laws of nature.

As an illustration of that principle, I may refer to a case which was cited in the argument before your Lordships, the case of Smith v. Kenrick, in the Court of Common Pleas, 7 C. B. 515 (E. C. L. R. vol. 62.)

On the other hand, if the defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land; and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the plaintiff, then it appears to me that that which the defendants were doing they were doing at their own peril; and if in the course of

their doing it the evil arose to which I have referred, the evil, namely, of the escape of the water and its passing away to the close of the plaintiff and injuring the plaintiff, then for the consequence of that, in my opinion, the defendants would be liable. As the case of Smith v. Kenrick is an illustration of the first principle to which I have referred, so also the second principle to which I have referred is well illustrated by another case in the same court, the case of Baird v. Williamson, 15 C. B. N. S. 317 (E. C. L. R. vol. 109), which was also cited in the argument at the Bar.

My Lords, these simple principles, if they are well founded, as it appears to me they are, really dispose of this case.

The same result is arrived at on the principles referred to by Mr. Justice BLACKBURN in his judgment in the Court of Exchequer Chamber, where he states the opinion of that Court as to the law in these words: "We think that the true rule of law is that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of *vis major,* or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapor of his neighbor's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbor who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequence. And upon authority this we think is

established to be the law, whether the things so brought be beasts, or water, or filth, or stenches."

My Lords, in that opinion I must say I entirely concur. Therefore, I have to move your Lordships that the judgment of the Court of Exchequer Chamber be affirmed, and that the present appeal be dismissed with costs.

BERGER v. MINNEAPOLIS GASLIGHT CO.

(60 Minn. 296: 62 N. W. 386.—1895)

START, Ch. J. * * * 2. The trial court instructed the jury, in legal effect, that the defendant was liable, without proof of negligence on its part, for the consequences to the plaintiffs resulting from petroleum escaping from its oil tank, if it did so escape, and creating a nuisance upon their premises. This instruction, as applied to this case, was correct, and in accordance with the law as declared by this court in the case of Cahill v. Eastman, 18 Minn. 324 (Gil. 292). In the case cited, the defendant was held liable, without proof of negligence on his part, for damages caused to the premises of the plaintiff by the construction of a tunnel on his own premises, through which water rushed in great volume upon the plaintiff's premises. This conclusion of the court was based upon the authority of Fletcher v. Rylands, L. R. 1 Exch. 265, affirmed in the House of Lords (Rylands v. Fletcher, L. R. 3 H. L. 330), which is a leading case, and is still adhered to in England. Fletcher v. Smith, L. R. 2 App. Cas. 781; Snow v. Whitehead, 27 Ch. Div. 588.

In this country it has not been universally followed, and many respectable courts have disapproved it, notably the court of appeals of the state of New York. Losee v. Buchanan, 51 N. Y. 476. In Massachusetts it was expressly approved in the case of Shipley v. Fifty Associates, 106 Mass. 194. After the decision in Losee v. Buchanan, and upon its authority, this court was asked, in the case of Knapheride v. Eastman, 20 Minn. 479 (Gil. 432), to reconsider the rule announced in Cahill v. Eastman, which it refused to do. BERRY, J., speaking for the court, said: "Cahill v. Eastman was decided upon a diligent examination of authorities, and, after much reflection and discussion, we are not aware of any principle pre-

sented by Losee v. Buchanan which we did not consider. * * * Without going into further details, or attempting to add to what we before said, it is only necessary to say that, having seen nothing to shake our confidence in the correctness of our former conclusion, we must decline to reconsider or revise it." The rule was again expressly approved by this court in the case of Hannem v. Pence, 40 Minn. 131, 41 N. W. 657.

The case of Day v. Lumber Co., 54 Minn. 522, 56 N. W. 243, relied upon by defendant's counsel, is in no manner in conflict with Cahill v. Eastman, and is not in point, for it was a case where fire escaped from the defendant's premises, and destroyed the plaintiff's property, and it was correctly held that there could be no recovery without proof of negligence on the part of the defendant. Fire is, and has been ever since the statute of 6 Anne, an exception to the rule that, where a person receives and keeps upon his premises anything not naturally there, the natural tendency of which is, if it escapes, to injure others, he is liable, without reference to any considerations of care and skill on his part. It is difficult to see why fire should have ever been included in the rule, for fire is one of the most beneficial servants of man,—an absolute necessity,—and, from its own nature, does not necessarily injure surrounding persons and things. There are some general statements in Cahill v. Eastman which seem to justify the instruction of the trial court in this case to the effect that every person who, for his own profit, keeps on his premises anything, not naturally belonging there, which, if it escapes therefrom into the premises of another, does damage, is liable for all the consequences of his acts, without reference to the degree of care he may have exercised to prevent it from escaping. We deem it proper, to prevent any misunderstanding, to say that this instruction is too broad, for it is only those things the natural tendency of which is to become a nuisance or to do mischief, if they escape, which their owner keeps at his peril. The essential condition of liability, without proof of negligence on the part of the owner, for injury to others by the escape of things kept by him on his own premises, is that the natural tendency of the things kept is to become a nuisance or to do mischief, if they escape. The authority of Cahill v. Eastman is not to be extended beyond the class of cases possessing all of the elements upon which the judgment of the court was based. The instructions of the court upon the question of the defendant's liability in this case, without proof of negligence, were

correct, and no prejudice could have resulted from the omission to limit the rule to those things the natural tendency of which, if they escape, is to become a nuisance or to do mischief, for the thing which did escape in this case was within the rule as limited.

MULLER v. McKESSON.

(73 N. Y. 195.—1878.)

CHURCH, Ch. J. The defendants had a chemical factory in Brooklyn and owned a ferocious dog of the Siberian bloodhound species, which was kept in the inclosed yard surrounding the factory, and generally kept fastened up in daytime and loosed at night as a protection against thieves. The plaintiff was in the employ of the defendants as a night watchman. It was his duty to open the gate to the yard every morning to admit the workmen, and to do this he would pass from the door of the factory across a corner of the yard to the gate. On the morning in question, as the plaintiff was returning from opening the gate, he was attacked from behind by the dog, thrown to the ground and severely bitten, and after freeing himself, and while endeavoring to reach the factory, was again attacked and bitten and seriously injured. Upon the close of the evidence, and after a motion for a nonsuit had been denied, the judge decided that there was no question for the jury but the question of damages, to which there was an exception. * * * *

The points urged by the appellants in this case are: First. That the plaintiff was guilty of contributory negligence or at least that the evidence would have warranted the jury in so finding. Second. That the plaintiff knew the vicious habits of the dog, and by voluntarily entering upon and continuing in the employment of the defendants, he assumed the risk of such accidents. Third. That if the injury was occasioned by the negligence of the engineer in not properly fastening the dog, or in omitting to notify the plaintiff that he was loose, it was the negligence of a co-servant, for which the defendants are not liable.

It may be that, in a certain sense, an action against the owner for an injury by a vicious dog or other animal, is based upon negligence;

but such negligence consists not in the manner of keeping or confining the animal, or the care exercised in respect to confining him, but in the fact that he is ferocious and that the owner knows it, and proof that he is of a savage and ferocious nature is equivalent to express notice. Earl v. Van Alstine, 8 Barb. 630. The negligence consists in keeping such an animal. In May v. Burdett, 9 Ad. & El. (N. S.) 101, DENMAN, Ch. J., said: "But the conclusions to be drawn from an examination of all the authorities appears to us to be this, that a person keeping a mischievous animal, with knowledge of its propensities, is bound to keep it secure at his peril, and that if he does mischief, negligence is presumed."

When accustomed to bite persons, a dog is a public nuisance and may be killed by any one when found running at large. Putnam v. Payne, 13 J. R. 312; Brown v. Carpenter, 26 Vt. 638. And when known to the owner, corresponding obligations are imposed upon him. Lord HALE says: "He (the owner) must, at his own peril, keep him up safe from doing hurt, for though he use his diligence to keep him up, if he escape and do harm the owner is liable in damages." In Kelly v. Tilton, 2 Abb. Ct. App. Cas. 495, WRIGHT, J., said: "If a person will keep a vicious animal, with knowledge of its propensities, he is bound to keep it secure at his peril." In Wheeler v. Brant, 23 Barb. 324, Judge BALCOM said: "Defendant's dog was a nuisance, and so are all vicious dogs, and their owners must either kill them or confine them as soon as they know their dangerous habits, or answer in damages for their injuries." In Card v. Case, 57 Eng. C. L. R. 622, COLTMAN, J., said: "That the circumstances of the defendant's keeping the animal negligently is not essential; but the *gravamen* is the keeping the ferocious animal, knowing its propensities." The cases are uniform in this doctrine, although expressed in a variety of language by different judges. Smith v. Pelah, 2 Strange, 1264; Jones v. Perry, 2 Esp. 482; Greason v. Keteltas, 17 N. Y. 496; Woolf v. Chalker, 31 Conn. 121; Blackman v. Simmons, 3 Car. & P. 138; Rider v. White, 65 N. Y. 54.

In some of the cases it is said that from the vicious propensity and knowledge of the owner negligence will be presumed, and in others that the owner is *prima facie* liable. This language does not mean that the presumption or *prima facie* case may be rebutted by proof of any amount of care on the part of the owner in keeping or restraining the animal, and unless he can be relieved by some act

or omission on the part of the person injured, his liability is absolute. "This presumption of negligence, if it can be said to arise at all, so as to be in any way material in a case where the owner is absolutely bound at his own peril to prevent mischief, is a *presumptio juris et de jure*, against which no averment or proof is receivable. It is not a presumption in the ordinary sense of the word, raising a *prima facie* case which may be rebutted." Card v. Case, *supra*, p. 623, note *b*. It follows that the doctrine of non-liability, arising from the negligence of a co-servant, in not properly fastening the animal, or in not giving notice of his being loose, cannot be invoked for the reason that the negligence of the master being immaterial, that of his servant must be also.

The point as to contributory negligence presents the most difficulty. There are expressions in some of the cases indicating that the liability of the owner is not affected by the negligence of the person injured. In Smith v. Pelah, 2 Strange, 1264, the owner was held liable, although the injury happened by reason of the person injured treading on the dog's toes, the chief justice saying: "For it was owing to his not hanging the dog on the first notice." It is not stated that the person injured knew of the dog's propensities, or that it was done intentionally. In Woolf v. Chalker, 31 Conn. 130, it is said that the owner is liable "irrespective of any questions of negligence of the plaintiff," and citing May v. Burdett and Card v. Case, *supra*.

In May v. Burdett the chief justice, after approving of the ruling in Smith v. Pelah, 2 Strange, *supra*, and a passage from Hale's Pleas of the Crown (p. 430), said: "It may be that if the injury was solely occasioned by the willfulness of the plaintiff after warning, that may be a ground of defense, but it is unnecessary to give any opinion as to this." It is not intimated, as before stated, in Smith v. Pelah, that the treading on the toes of the dog was done intentionally, or with knowledge of his viciousness, and I do not think that it can be claimed from authority, and certainly not from principle, that no act of the person injured would preclude him from recovering, however negligent or willful. The apparent conflict on this point arises, I think, mainly in not making a proper application of the language to the facts of the particular case. If a person with full knowledge of the evil propensities of an animal wantonly excites him, or voluntarily and unnecessarily puts himself in the way of such an animal, he would be adjudged to have brought

the injury upon himself, and ought not to be entitled to recover. In such a case it cannot be said, in a legal sense, that the keeping of the animal, which is the *gravamen* of the offense, produced the injury. Coggswell v. Baldwin, 15 Vt.. 404; Koney v. Ward, 36 How. P. R. 255; Wheeler v. Brant, 23 Barb. 324; Blackman v. Simmons, 3 Car. & P. 138; Brock v. Copeland, 1 Esp. 203; Bird v. Holbrook, 4 Bing. 682. But as the owner is held to a rigorous rule of liability on account of the danger to human life and limb, by harboring and keeping such animals, it follows that he ought not to be relieved from it by slight negligence or want of ordinary care. To enable an owner of such an animal to interpose this defense, acts should be proved with notice of the character of the animal, which would establish that the person injured voluntarily brought the calamity upon himself. Brock v. Copeland, 1 Esp. 203, cited and relied upon by the counsel for the appellant, is in some of its features like this, and while some of the language of Lord KENYON is not in harmony with that used in other cases, yet from the facts stated it is fairly inferable that the foreman voluntarily went into the yard at an unusual time and, so far as appears, without business, knowing that the dog was loose and knowing his ferocious nature. The question then recurs whether, from the facts appearing in this case, the jury would have been justified in finding that the plaintiff was guilty of that kind of negligence which would relieve the defendants; in other words, could they have found that in any proper sense the plaintiff brought the injury upon himself? He was in discharge of his duty at the proper time and in the right place. He passed from the factory to the gate in the direct path, and was returning when he was attacked by the dog. In Blackman v. Simmons, 3 C. & P. 138. the injury was by a vicious bull, and the court laid stress upon the circumstances that the plaintiff was traveling where he had a right to go, and said: "If the plaintiff had gone where he had no right to go, that might have been an answer to the action." It was not shown that the plaintiff was out of his place, nor what was more important and indispensable, was it shown that the plaintiff had notice that the dog was loose, or that he had reason to suppose that he was loose. It was the custom of Godfrey, the engineer, to loose the dog at night and fasten him in the morning, and to notify the plaintiff that the dog was loose. No such notice was given. The plaintiff testifies positively that he did not know or suppose the dog was loose, and from the evidence of Godfrey, called by the defend-

ants, it is inferable that the dog had not been loosed for several days, and if it had the plaintiff had a right to suppose that Godfrey had fastened him that morning. It is sufficient to say that the evidence did not show that the plaintiff had notice that the dog was loose, nor were the circumstances such as to induce him to believe that such was the fact. If the negligence of the plaintiff is to prevail, it must be predicated upon not taking the precaution to look, examine and ascertain whether the dog was fastened or not. The plaintiff might have ascertained by examination whether the dog was fastened in his kennel or not; but I do not think that he was bound to exercise that degree of care, or that the defendant can be relieved from liability because he did not.

It does not appear that such had been his habit, or that his attention had been called to any circumstance to call for unusual precaution. The evidence must have been sufficient to warrant the jury in finding actual notice that the dog was loose, or at least that the plaintiff had reason to so believe. This rule is quite as liberal as ought to be adopted in favor of a person who keeps an animal of such savage ferocity as this was found to be. Ilot v. Wilkes, 3 B. & A: 308, and Bird v. Holbrook, 4 Bing. 628, were both cases of spring guns; in the former the person injured had notice, and in the latter, though a trespasser, he had not, and the action was held maintainable in the latter and not in the former. BEST, Ch. J., sat in both cases, and in the last said: "If anything which fell from me in Ilot v. Wilkes were at variance with the opinion I now express, I should not hesitate to retract it, but the ground on which the judgment of the court turned in that case is decisive of the present, and I should not have labored the point that the action was not maintainable in that case, on the ground that the plaintiff had received notice, unless I had deemed it maintainable if no notice had been given." In the former case HOLROYD, J., expresses the principle of non-liability, when notice has been given, to be that the act which produced the injury to the plaintiff "must be considered wholly as his act, and not the act of the person who placed the gun there."

As negligence, in the ordinary sense, is not the ground of liability, so contributory negligence, in its ordinary meaning, is not a defense. These terms are not used in a strictly legal sense in this class of actions, but for convenience. There is considerable reason in favor of the doctrine of absolute liability for injuries produced by a savage dog, whose propensities are known to the owner, on the ground

of its being in the interest of humanity, and out of regard to the sanctity of human life: but as these animals have different degrees of ferocity, and the rule must be a general one, I think, in view of all the authorities, that the rule of liability before indicated is a reasonable one, and that the owner cannot be relieved from it by any act of the person injured, unless it be one from which it can be affirmed that he caused the injury himself, with a full knowledge of its probable consequences.

The evidence in this case falls far short of warranting a verdict that the plaintiff had committed any such act. As before stated he had no notice that the dog was loose, but had every reason to suppose that he was fastened, and did in fact suppose so. He was in the discharge of his duty, and was not called upon to institute an inquiry whether the dog had broken his fastenings, or that Godfrey had been negligent in not giving him notice that the dog was loose.

The remaining point, that the plaintiff assumed the risk of such accidents, is not tenable. The rule is that a servant assumes the ordinary risks incident to the business in which he engages. What were the risks of his employment here as it respects the dog? He was informed, it is true, of the nature of the animal, but he was also told that the dog would be kept fastened, and the uniform habit was to notify him when the dog was loose. By the terms of his employment, and the conduct of those who represented the defendants, the most that can be said is that he assumed the risks consequent upon the keeping of a ferocious dog, which was kept fastened except when he was otherwise notified. Beyond this the plaintiff is entitled to the same protection as other persons. This is not a case for relaxing the rule of liability. The dog was of immense size, and a brute as savage as a tiger or a lion, and should be more properly classed with such wild beasts than with the domestic dog, which, although useless, is generally comparatively harmless. He had no respect for persons. In the language of the person who sold him to defendants, "he bit everybody." There is no legal excuse for exposing human life to the ferocity of such an animal.

The judgment must be affirmed.

Judgment affirmed.[1]

[1] Ordinary familiarities with a dog running loose, such as offering the dog a piece of candy, cannot be called negligence. Lynch v. McNally, 73 N. Y. 347. It is not necessary that the vicious acts of a domestic animal, brought to the notice of the owner, should be precisely similiar to that upon which the action

FILBURN v. PEOPLE'S PALACE CO.

(25 Q. B. D. 258.—1890.)

Tort for injuries inflicted by an elephant owned and exhibited by defendants. The trial judge left three questions to the jury: whether the elephant was an animal dangerous to man; whether the defendant knew the elephant to be dangerous; whether the plaintiff brought the attack on himself. The jury answered all three questions in the negative, and judgment was entered for plaintiff, from which defendant appealed.

Lord ESHER, M. R. The only difficulty I feel in the decision of this case is whether it is possible to enunciate any formula under which this and similar cases may be classified. The law of England recognizes two distinct classes of animals; and as to one of the classes, it cannot be doubted that a person who keeps an animal belonging to that class must prevent it from doing injury, and it is immaterial whether he knows it to be dangerous or not. As to another class, the law assumes that animals belonging to it are not of a dangerous nature, and any one who keeps an animal of this kind is not liable for the damage it may do, unless he knew that it was dangerous. What, then, is the best way of dealing generally with these different cases? I suppose there can be no dispute that there are some animals that every one must recognize as not being dangerous on account of their nature. Whether they are *ferœ naturæ* so far as rights of property are concerned is not the question; they certainly are not so in the sense that they are dangerous. There is another set of animals that the law has recognized in England as not being of a dangerous nature, such as sheep, horses, oxen, dogs and others that I will not enumerate. I take it this recognition has come about from the fact that years ago, and continuously to the present time, the progeny of these classes has been found by experience to be harmless, and so the law assumes the result of this experience to be correct without further proof. Unless an animal is brought

against him is founded. Reynolds v. Hussay, 5 At. 458, 64 N. H. 64, (1886). The domestic dog is no longer an object of judicial contempt in New York. Mallaly v. People, 86 N. Y. 365.

within one of these two descriptions—that is, unless it is shown to be either harmless by its own nature or to belong to a class that has become so by what may be called cultivation,—it falls within the class of animals as to which the rule is, that a man who keeps one must take the responsibility of keeping it safe. It cannot possibly be said that an elephant comes within the class of animals known to be harmless by nature, or within that shown by experience to be harmless in this country, and consequently it falls within the class of animals that a man keeps at his peril, and which he must prevent from doing injury under any circumstances, unless the person to whom the injury is done brings it on himself. It was therefore immaterial in this case whether the particular animal was a dangerous one, or whether the defendants had any knowledge that it was so. The judgment entered was in these circumstances right, and the appeal must be dismissed.[1]

HEWEY v. NOURSE.

(54 Me. 256.—1866.)

DICKERSON, J. This is an action on the case, charging the defendant with kindling a fire upon his own land, for a lawful purpose, "at an unsuitable time and in a careless and imprudent manner," and that the fire, for want of proper care on his part, "spread, and caused great damage to the plaintiff's woodland, down timber, wood and bark." No reference is made in the writ to the statute upon the subject; and the declaration appears to be drawn according to the usual formula where the remedy is sought at common law. As the statute does not abrogate the common law, but is rather a substantial affirmance of it, we need only consider the principles of the common law applicable in such cases.

There was testimony in the case tending to show that there was a piece of crippled land, or land covered with down wood and brush,

[1] Compare Parsons v. Manser, 119 Ia. 88, 93 N. W. 86, (1903) holding it a question for the jury, whether defendant was negligent in having hives of bees near the highway; and Bormann v. City of Milwaukee, 93 Wis. 522, 67 N. W. 924 (1896), where the plaintiff knew the vicious disposition of the animal, and was held bound to show his freedom from contributory negligence.

adjoining that on which the fire was kindled, and that, after the fire caught on that land, it became unmanageable and was not subject to human control, in consequence of the violence of the wind, until after it had reached the plaintiff's land, and done the damage complained of. The counsel for the defendant contended that the defendant would not be liable for the damage thus done, if the fire was kindled at a suitable time, and in a prudent manner; but the court instructed the jury that, if the defendant was in any fault in setting fire or in guarding and taking care of it at any time before it blew on to the crippled land, in consequence of which fault the wind blew the fire on to the same, he would be liable, although, after the wind so blew the fire, it became unmanageable, until after the plaintiff's property was injured. The verdict was for the plaintiff, and the defendant excepted.

Every person has a right to kindle a fire on his own land for the purpose of husbandry, if he does it at a proper time, and in a suitable manner, and uses reasonable care and diligence to prevent its spreading and doing injury to the property of others. The time may be suitable and the manner prudent, and yet, if he is guilty of negligence in taking care of it, and it spreads and injures the property of another in consequence of such negligence, he is liable in damages for the injury done. The gist of the action is negligence, and if that exists in either of these particulars, and injury is done in consequence thereof, the liability attaches; and it is immaterial whether the proof establishes gross negligence or only a want of ordinary care on the part of the defendant. Batchelder v. Keagan, 18 Maine, 38; Barnard v. Poor, 21 Pick. 380; Tourtellot v. Rosebrook, 11 Met. 462.

Where only a portion of the instructions to the jury is reported, it will be presumed that the presiding judge gave all other proper instructions. Sidensparker v. Sidensparker, 52 Maine, 481. The "fault" mentioned in the reported instructions is to be understood as that degree of negligence which amounts to a want of ordinary care. The instructions predicate the defendant's ability upon his neglect to use the ordinary means to prevent the fire spreading upon the crippled land indicated by the evidence. The jury were told, in effect, that if the defendant's fault were not the sole cause of the wind blowing the fire upon the crippled land, he was not liable. The "fault," to be found by the jury, in order to warrant a verdict by the plaintiff, was not a trifling or insignificant one, but a cul-

pable neglect "in consequence of which the wind blew the fire" into the dangerous quarter, a direction quite as favorable to the defendant as he was entitled to. Whether the fault or negligence consisted in the time or manner of kindling the fire, or the means used to prevent its spreading, was immaterial, as either would be sufficient to render the defendant liable if the plaintiff had suffered injury thereby. We can discover no error in refusing to give the requested instructions, or in the instructions given.

The motion to set aside the verdict as against the weight of evidence is not sustained. There was testimony on both sides, and the jury have found that it preponderated in favor of the plaintiff. The fitness of the time, appropriateness of the manner, and the requirements of ordinary care in respect to the subject matter in controversy, are familiar topics to those usually called to act as jurors. To justify the court in setting the verdict aside, for the cause alleged in the motion, there must be such a manifest weight of evidence against the verdict, as to render it clear that the jury either misapprehended the evidence, or were guilty of gross misconduct. We see nothing in this case to warrant such a conclusion.[1]

* * * * *

DENVER CONSOLIDATED ELECTRIC CO. v. SIMPSON.

(21 Col. 371; 41 Pac. 499.—1895.)

CAMPBELL, J. This was an action by the appellee to recover damages for personal injuries. The evidence tends to show that the appellant, for the purpose of furnishing light, was engaged in the business of conveying and distributing electricity throughout the city of Denver by means of wires atached to and suspended from poles placed in the streets and alleys of the city. While the plaintiff was lawfully passing along one of the public alleys in the city, without any fault on his part, he came in contact with one of the defendant's wires, heavily charged with electricity, which wire had

[1] For the rule in Iowa under a statute as to prairie fires, see Thorburn v. Campbell, 45 N. W. 769. It is negligent to leave a porcelain factory unguarded while kiln is cooling. Hauch v. Hernandez, 6 So. 783; 41 La. Ann. 992.

become disconnected and detached from its overhead fastening, and was hanging down to within about two feet of the ground in said alley. As the result of such contact, plaintiff received a severe shock from the electricity carried by the wire, and was seriously injured. The negligence charged against the defendant, of which there was some proof, consisted in its failure properly to construct its line, and its omission to take the necessary precautions to prevent the wires from falling and causing injury in case they became detached from their fastenings. There was a verdict for the plaintiff in the sum of $2,800, upon which the court entered judgment, to reverse which the appellant prosecutes this appeal. * * * *

The most important and difficult questions concern the instructions given by the court. The defendant requested a number of instructions, some of which the court refused altogether. Others it gave with modifications. This branch of the case we will consider under two general heads,—Alleged error of the court in instructing upon what constitutes *prima facie* negligence in cases of this kind; alleged errors in instructing as to the nature and extent of the duty of the defendant to the general public using the highway over and across which its wires are strung. In substance, the court instructed the jury that if they found that the defendant's wire was so charged with electricity as to become dangerous to persons coming in contact with it, and that the wire had become disconnected or detached from its fastenings, and hung down in a public alley so as to endanger public travel, that, of itself, was *prima facie* evidence of negligence on the part of defendant. Strictly speaking, except in some relations springing out of contract, the mere happening of an accident is not any evidence of negligence. Thomp. Carr. Pass. p. 209, § 9. But in some cases of tort it has been held that the existence of certain facts, unexplained, is some evidence of negligence. Thomas v. Telegraph Co., 100 Mass. 156, and Haynes v. Gas Co., 114 N. C. 203, 19 S. E. 344, are cases in point, and are authority for the instruction given in this case.

This is the first case in this court where it has become necessary to determine the duty to the traveling public resting upon a person or corporation distributing electricity by means of wires suspended above a public street or alley. The employment of electricity for supplying light is of comparatively recent origin. The best methods of constructing lines for its distribution, and the precautionary steps to be taken to guard the public from the dangers incident to its use,

may not be known or fully understood. But enough is known to justify the statement that the business of distributing electricity on wires strung over the streets of a city is a dangerous business, and attended by peril to travelers along the highway. This court does not recognize any degrees of negligence, such as slight or gross, and logically it ought not to recognize any degrees in its antithesis, care. The court instructed the jury in this case that the defendant was not an insurer of the safety of plaintiff, but that, in constructing its line and maintaining the same in repair, it was held to the utmost degree of care and diligence; that in this respect it is bound to the highest degree of care, skill, and diligence in the construction and maintenance of its lines of wire and other appurtenances, and in carrying on its business, so as to make the same safe against accidents, so far as such safety can, by the use of such care and diligence, be secured. If it observed such degree of care, it was not liable. If it failed therein, it was liable for injuries caused thereby. We think the court was unfortunate in attempting to draw any distinctions in the degrees of care or negligence. It would have been safer and the better practice to instruct the jury,—which ought hereafter to be observed,—even in cases like the one before us, that the defendant was bound to exercise that reasonable care and caution which would be exercised by a reasonably prudent and cautious person under the same or similar circumstances. In addition to this, the jury should have been instructed that the care increases as the danger does, and that, where the business in question is attended with great peril to the public, the care to be exercised by the person conducting the business is commensurate with the increased danger. But, in effect, this is what the court did. Under the facts of the case, the law required of the defendant, conducting, as it did, a business so dangerous to the public, the highest degree of care which skill and foresight can attain, consistent with the practical conduct of its business under the known methods and the present state of the particular art. This is the measure of the duty owed by a common carrier to a passenger for hire. Thomp. Carr. Pars. p. 208, and cases cited.

Not for the same reason, or because the doctrine rests upon the same principle, but with even greater force, should this rule apply to a person or corporation engaged in the equally, if not more, dangerous business of distributing electricity throughout a city by means of wires strung over the public alleys and streets, is so far as

is concerned its duty to the traveling public. In those courts where degrees of negligence are not countenanced, nevertheless, in cases where the duty of a common carrier of passengers is laid down, the jury are told that carriers are bound to the utmost degree of care which human foresight can attain. This is upon the theory that reasonable or ordinary care in a case of that kind is the highest care which human ingenuity can practically exercise, and that, as a matter of law, courts will hold every reasonably prudent and careful man to the exercise of the utmost care and diligence in protecting the public from the dangers necessarily incident to the carrying on of a hazardous business. Where the facts of a case naturally lead equally intelligent persons honestly to entertain different views as to the degree of care resting upon a defendant, the court ought not to lay down a rule prescribing any particular or specific degree in that case. But where all minds concur—as they must in a case like the one we are now considering—in regarding the carrying on of a business as fraught with peril to the public, inherent in the nature of the business itself, the court makes no mistake in defining the duty of those conducting it as the exercise of the utmost care. It was, therefore, not prejudicial error for the court to tell the jury in this case what the law requires of the defendant, viz. the highest degree of care in conducting its business. The late case of Block v. Railway Co., 89 Wis. 371, 61 N. W. 1101, rightly interpreted, supports this doctrine, and the case of Haynes v. Gas Co., *supra*, expressly lays down the rule observed by the trial court in the instructions given in this case.

The judgment will be affirmed.[1]

[1] *Accord*, McKay v. Southern Bell Tel. Co., 111 Al. 337, 19 So. 695 (1896); holding the Telephone Co. and a street railroad company jointly liable, where the defective wires of the former fell upon those of the latter and the combined current killed plaintiff's horses; Girandi v. Electric Co. 107 Cal. 120, 40 Pac. 108, 48 Am. St. R. 114, 28 L. R. A. 596; Herbert v. Lake Charles Light Co., 111 La. 522, 35 So. 731, 63 L. R. A. 101 (1903), and cases therein cited. In Overall v. Louisville Electric Co., (Ky.) 47 S. W. 442 (1898), it is said: "Electricity is the most powerful and dangerous element known to science. It cannot be seen, and it is as silent as it is deadly, and it follows that those who manufacture and use it for private advantage must do so at their peril. The only way to prevent accidents, where a deadly current is used, is to have perfect protection at those points where people are liable to come in contact with it. And the jury in this case should have been instructed that this was the duty of the defendant. To have told them 'that it was the duty of defendant to observe the highest degree of care and skill

CARTER v. TOWNE.

(98 Mass. 567.—1868.)

GRAY, J. By the well-settled rule of the common law, a person who negligently uses a dangerous instrument or article, or causes or authorizes its use by another person, in such a manner or under such circumstances that he has reason to know that it is likely to produce injury, is responsible for the natural and probable consequences of his act to any person injured, who is not himself in fault. The liability does not rest on privity of contract between the parties to the action, but on the duty of every man so to use his own property as not to injure the persons or property of others. The principle has been applied in a great variety of instances, and may be sufficiently illustrated by a few cases of undoubted authority.

In the leading case of Dixon v. Bell, 1 Stark. R. 287, and 5 M. & S. 198, the declaration alleged that the defendant sent a young maid-servant for a loaded gun, whom he knew to be too young and an unfit person to be intrusted with the care and custody of it, and that she carelessly and improperly shot the gun at and into the face of the plaintiff's minor son, and severely wounded him, and put the plaintiff to great expenses for his cure. Upon evidence tending to prove the facts alleged, Lord ELLENBOROUGH submitted to the jury the question whether the defendant was guilty of negligence in intrusting the gun to a servant of such an age, who under all circumstances was likely to make such a use of it as a person of greater discretion would not have done; and instructed them that, if they were of opinion that the instrument in such a state ought not to have been intrusted to such a person, the plaintiff would be entitled to their verdict; and the jury returned a verdict for the plaintiff, which the Court of King's Bench, after argument, refused to set aside. So the English courts have held that one who delivers an article which he knows to be of an explosive and dangerous quality to a carrier, without informing him of its nature, is responsible for any injury resulting to the ship in which it is carried, to other goods

usually exercised by prudent persons engaged in the same or similar business, to keep its wires so insulated as to be reasonably safe and free from danger to persons who might come into contract with them,' was not sufficient. The law requires, at those points where such contact is likely to take place, perfect protection from this unseen and terrible power."

carried with it, or to the carrier's servant to whom the delivery is made. Williams v. East India Co., 3 East, 192; Brass v. Maitland, 6 El. & Bl. 470; Farrant v. Barnes, 11 C. B. (N. S.) 553. See, also, McDonald v. Snelling, 14 Allen, 290, and cases there cited; Vaughan v. Menlove, 7 C. & P. 525, and 3 Bing. N. C. 468; Mayor of Colchester v. Brooke, 7 Q. B. 377; Longmeid v. Holliday, 6 Exch. 767, 768; Grizzle v. Frost, 3 Fost. & Finl. 622; McGrew v. Stone, 53 Penn. State, 436.

The declaration in this case alleges, and the demurrer admits, that the plaintiff was a child eight years old, had neither experience or knowledge in the use of gunpowder, and was an unfit person to be intrusted with it; that the defendants, knowing all this, sold and delivered to him two pounds of gunpowder; and that he, in ignorance of its effect and using that care of which he was capable, exploded it, and by the explosion was severely injured. This injury was clearly, within the authorities above cited, the proximate and natural consequence of the defendants' negligence in selling a dangerous article to a child whom they knew to be, by reason of his youth and ignorance, unfit to be intrusted with it, and who probably, therefore, as they had reason to believe, might innocently and ignorantly play with it to his own injury. The case cannot be distinguished in principle from that of a man who delivers a cup of poison to an idiot, or puts a razor into the hand of an infant in its cradle. The want of any direct intention to injure does not excuse the defendants. "Every man must be taken to contemplate the probable consequences of the act he does." By Lord ELLENBOROUGH, Ch. J., in Townsend v. Wathen, 9 East, 280. It is immaterial whether the defendants had or had not a license from the municipal authorities to sell gunpowder; for no license could protect them from liability for the consequences of selling it to a person whom they knew to be incapable of taking proper care of it. The fact that the defendants by their act of negligence obtained money from the plaintiff certainly does not tend to diminish their liability.

In the cases in which fault on the part of a child, who had not been wanting in the degree of care which could reasonably have been expected from one of his age, has been held to defeat his right to recover damages from an injury resulting to him from another's negligence, either the child was technically a trespasser, unlawfully meddling with the property of another, as in Hughes v. McFie, 2

H. & C. 744, and Mangan v. Atherton, Law Rep. 1. Exch. 239; or his parents or other persons having charge of him, with whom he was identified, had been guilty of negligence, without which the injury would not have happened. Holly v. Boston Gas Light Co., 8 Gray, 123; Wright v. Malden & Melrose Railroad Co., 4 Allen, 283; Callahan v. Bean, 9 Allen, 401; Munger v. Tonawanda Railroad Co., 4 Comst. 349; Singleton v. Eastern Counties Railway Co., 7 C. B. (N. S.) 287. But, in the case at bar, the declaration alleges that the child used that care of which he was capable; he did not touch the defendants' property, but property which the defendants had negligently and unlawfully sold to him; and there is nothing to show that his parents or guardians had been guilty of any negligence whatever. Suffering a boy eight years old to be abroad alone is not necessarily negligent. Lovett v. Salem & South Danvers Railroad Co., 9 Allen, 557. See, also, Munn v. Reed, 4 Allen, 431.

Demurrer overruled.[1]

CURTIN v. SOMERSET.

(140 Penn. St. 70.—1891.)

PAXSON, C. J. The defendant, Philip H. Somerset, entered into a contract with the Sea Isle City Hotel Company, for the erection of a hotel building, at Sea Isle City, according to certain plans and specifications. The building was completed, and accepted by the

[1] The use of a public highway as a place for exploding fireworks constitutes a nuisance, and every participant in the creation of the nuisance is responsible for its ill effects. Jennè v. Sutton, 43 N. J. L. 257. holding the president of a political club liable for damages caused by fireworks set off in the street to signalize the meeting of the club. An infant is liable for damages caused by exploding firecrackers in the street. Conklin v. Thompson, 29 Barb. 218. In this case it was claimed that plaintiff's horse died of sudden fright caused by the explosion of a firecracker under him. See also Binford v. Johnson, 82 Ind. 426, 42 Am. R. 508 (1882); Meers v. McDowell, 110 Ky. 926, 62 S. W. 1013. In the latter case it is said: "If the defendant's child was, from age or mental weakness or the use of intoxicants, incompetent to be intrusted with a deadly weapon, and the defendant knew the danger, or should have known it in the exercise of reasonable care, he should not have permitted him to use the loaded rifle. See note, Chaddock v. Plummer, 88 Mich. 225, 14 L. R. A. 675 (s. c. 50 N. W. 135.)"

hotel company in the presence of their architect and the chairman of the building committee. Subsequently, at an entertainment given at the hotel by the proprietor or lessee, a crowd of persons, some twenty or more, having collected on the porch, a girder, which in part supported it, gave way, the porch fell, and by reason thereof the plaintiff (a guest at the hotel) was injured. He brought this suit in the court below against the contractor, to recover damages for the injury he thus sustained, with the result of a verdict in his favor for $4,000.

Upon the trial, the defendant asked the court below to instruct the jury that "if Somerset, the defendant, was the contractor for the erection of the hotel in question, for the Sea Isle City Hotel Company, the owner, and after completion delivered possession of it to the said Sea Isle City Hotel Company on June 30, 1888, which company accepted it, and if the accident in question happened after June 30, 1888, and while said owner or his lessee was in possession, then the plaintiff is not entitled to recover against the defendant." See first assignment. This point was refused, and it fairly presents the important question in the case.

The contention of the plaintiff is that the accident was caused by the defective construction of the porch; that it was not according to the plans and specifications called for by the contract; that timbers inferior in size and quality to those called for by the plans were used; that these defects were not observable after the building was completed, and, in point of fact, were unknown to the company when it accepted the building from the contractor.

We must assume these allegations as substantially found by the jury, and the question arises, what is the responsibility of the contractor under such circumstances? That he would be responsible to the company for any loss sustained by it in consequence of his failure to erect the building in conformity to the plans and specifications, may be conceded. There was a contractual relation between them, and for breach of a contract, not known to and approved by the company, he would be liable. Is he also liable for an injury to a third person not a party to the contract, sustained by reason of defective construction? It is very clear that he was not responsible by force of any contractual relation, for, as before observed, there was no contract between these parties, and hence there could have been no breach. If liable at all, it can only be for a violation of some duty. It may be stated, as a general proposition, that a man

is not responsible for a breach of duty where he owes no duty. What duty did the defendant owe to the plaintiff? The latter was not upon the porch by the invitation of the defendant. The proprietor of the hotel, or whoever invited or procured the presence of the plaintiff there, may be said to have owed him a duty,—the duty of ascertaining that the porch was of sufficient strength to safely hold the guests whom he had invited. The plaintiff contended, however, that as the hotel company was not responsible, the contractor must necessarily be so. This, however, is moving in a circle. It by no means follows that because A. is not responsible for an accident B. or some other person must be.

Authorities are not abundant upon this point, for the reason that it is comparatively new. I do not know of any direct ruling upon it in this State. The true rule, which we think applicable to it, may be found in Wharton on Negligence, 2d ed. § 438. It is as follows: —"There must be causal connection between the negligence and the hurt; and such causal connection is interrupted by the interposition between the negligence and the hurt of any independent human agency. * * * Thus, a contractor is employed by a city to build a bridge in a workmanlike manner, and, after he has finished his work and it has been accepted by the city, a traveler is hurt when passing over it by a defect caused by the contractor's negligence. Now the contractor may be liable on his contract to the city for his negligence, but he is not liable to the traveler in an action on the case for damages. The reason sometimes given to sustain such a conclusion is that otherwise there would be no end to suits. But a better ground is that there is no causal connection between the traveler's hurt and the contractor's negligence. The traveler reposed no confidence in the contractor, nor did the contractor accept any confidence from the traveler. The traveler, no doubt, reposed confidence in the city that it would have its bridges and highways in good order; but between the contractor and the traveler intervened the city, an independent, responsible agent, breaking the casual connection."

In § 438, the same learned author refers to the case of a contract with the postmaster-general to furnish certain roadworthy carriages; and after the delivery of the carriages the plaintiff is injured in using one of them, by reason of the carriage having been defectively built.

"No doubt," says Mr. Wharton, "had the carriage been built for the plaintiff, he could have recovered from the contractor. But

there is no confidence exchanged between him and the contractor; and between them breaking the causal connection, is the postmaster-general acting independently, forming a distinct legal center of responsibilities and duties." This rule is distinctly recognized in Winterbottom v. Wright, 10 M. & W. 115. * * * Francis v. Cockrell, L. R. 5 Q. B. 501; Heaven v. Pender, 11 Q. B. 503; Collis v. Selden, L. R. 3 C. P. 495; and other English cases, recognize the doctrine that in such instances there is no duty owing from the contractor to the public. As was said by MARTIN, B., in Francis v. Cockrell, *supra:* "The law of England looks at proximate liabilities as far as possible, and endeavors to confine liabilities to the persons immediately concerned." In Losee v. Clute, 51 N. Y. 494, it was held that the manufacturer and vendor of a steam-boiler is only liable to the purchaser for defective materials, or for any want of care and skill in its construction; and if, after delivery to and acceptance by the purchaser, and while in use by him an explosion occurs in consequence of such defective construction, to the injury of a third person, the latter has no cause of action, because of such injury, against the manufacturer.

We do not find that any of the cases cited on behalf of the plaintiff conflict with the above views. In Godley v. Hagerty, 20 Pa. 387, the builder was the owner, and he was properly held responsible for an inherent weakness in the building by which an accident occurred. In Carson v. Godley, 26 Pa. 111, the warehouse was erected under the personal superintendence of the owner, and having leased it to the government, he was held liable to a person whose goods were destroyed by the fall of the building, in consequence of its insufficiency for the purpose for which it was erected and leased. In Thomas v. Winchester, 6 N. Y. 397, the court held a dealer in drugs and medicines, who carelessly labels a deadly poison as a harmless medicine, and sends it so labeled into market, to be liable to all persons who, without fault on their parts, are injured by using it. We think this case was correctly decided, but it has no application. The druggist owed a duty to every person to whom he sold a deadly poison, to have it properly labeled to avoid accidents. Just here the analogy between this case and the one in hand ceases. The defendant owed no duty to the public, as before stated; his duty was to his employer.

We need not pursue the subject further. We regard the weight of authority as with the views above indicated. Moreover, they are

sustained by the better reason. The consequences of holding the opposite doctrine would be far reaching. If a contractor who erects a house, who builds a bridge, or performs any other work; a manufacturer who constructs a boiler, a piece of machinery, or a steamship, owes a duty to the whole world that his work or his machine or his steamships shall contain no hidden defect, it is difficult to measure the extent of his responsibility, and no prudent man would engage in such occupations upon such conditions. It is safer and wiser to confine such liabilities to the parties immediately concerned. We are of the opinion that the defendant's first point should have been affirmed. So, also, his second point, which asked for a binding instruction in his favor.[1] * * * *

[1] Heizer v. Kingsland Co., 110 Mo. 605; 46 A. L. J. 53, *accord.* In Schubert v. J. R. Clark Co., 49 Minn. 331, the plaintiff recovered in tort against the defendant, for personal injuries sustained while using a step-ladder, which had been manufactured by defendant and sold to a retail dealer who sold it to plaintiff's employer. "It was made of poor, cross-grained and decayed lumber and was so insufficient in strength as to be dangerous to the life and limb of this plaintiff and whoever might use the same," and "the dangerous defects were concealed by the application of oil, paint and varnish, although * * * not applied for the purpose of concealing such defects." When the defendant manufactured and put the dangerously faulty article in its stock for sale, it is to be deemed to have anticipated that, in the ordinary course of events, it would come to the hands of a purchaser, either directly from the defendant or from some intermediate dealer, for actual use, and with the consequences which actually were suffered. It must have been deemed probable that any intervening dealer would not discover the defect, and that nothing would be likely to occur to avert the danger to which the person who might use the ladder would be subjected by the defendant's negligence. Hence it would be difficult to distinguish such a case in principle from one where the transaction is directly between the wrongdoer then knowing the danger, and the party who is injured. * * * We consider that in principle the defendant should be held to responsibility for an injury resulting proximately, and without any intervening, wrongful agency, from its confessedly negligent act which was such as to expose another to great bodily harm; and that no reason of policy forbids."

A contractor, manufacturer, vendor or bailor is not liable to third parties, who have no contractual relations with him, for negligence.

WATERHOUSE v. JOSEPH SCHLITZ BREWING CO.

(12 S. Dak. 397: 81 N. W. 725.—1900.)

CORSON, J. This is an action by the plaintiff to recover damages for injuries received by him, caused by the falling of a building owned by the defendant. A demurrer was interposed to the complaint on the ground that the same did not state facts sufficient to constitute a cause of action against the defendant, and also that it appears on the face of the said complaint that there is a defect of parties defendant. The demurrer was overruled, and from the order overruling the demurrer defendants appeals. * * * It seems to be the proper rule that the landlord is liable for the negligent construction, and the tenant for the negligent use, of the premises. If a dangerous or injurious structure is erected on the premises when he lets them to the tenant, the landlord is, of course, liable, but he cannot be made answerable for such a structure erected by the tenant unless he renews the lease for the premises after knowledge of such dangerous or injurious structure; and if the injury occurs after the original owner has alienated the property, from a dangerous structure erected by him before alienation, he is not liable, the new owner alone being responsible. 16 Am. & Eng. Enc. Law. 473, 474; Congreve v. Smith, 18 N. Y. 79; Clifford v. Dam, 81 N. Y. 52; Swords v. Edgar, 59 N. Y. 28; Davenport v. Ruckman, 37 N. Y. 568; Anderson v. Dickie, 26 How. Prac. 105; Knauss v. Brua, 107 Pa. St. 85; Khron v. Brock, 144 Mass. 516, 11 N. E. 748. The owner of a building adjoining a street or highway is under a legal obligation to take reasonable care that it is kept in proper condition, so that it shall not fall into the street or highway and injure persons lawfully there. Mullen v. St. John, 57 N. Y. 567. The general rule is that every person must so use his own property as not to injure others. Anything wrongfully done or committed which injures or annoys another in the enjoyment of his legal right is an actionable nuisance. Cooley, Torts, § 565. A nuisance may result from the negligent acts of commission or omission of another. The owner is liable if the nuisance was erected on the land by the prior owner or by a stranger, and he knowingly maintains or continues it. Metzger v. Schultz (Ind. App.) 43 N. E. 886. If, therefore, the building in controversy was originally negligently constructed of

unsafe and unsuitable material, so that it was liable to fall of its own weight, it constituted a nuisance; and if the defendant, with knowledge of its negligent construction and the use of unsuitable material therein, continued to use said building, or permitted it to be used, it was guilty of continuing the nuisance, and would be liable to the party injured by reason of the negligent construction of the building, and the use in the construction of such building of improper and unsuitable materials. Swords v. Edgar, *supra;* House v. Metcalf, 27 Conn. 631.

The contention of appellant that the statement in the complaint that the building had been owned and used by the defendant for more than ten years tends to contradict the statement that the building was negligently and improperly constructed, is not tenable. From the fact that the building fell of its own weight, without any external violence, a fair presumption would be that the fall occurred through adequate causes, one of the nost natural of which would be the negligent and faulty construction of the building itself. The fact, therefore, that it had stood for a number of years without falling, would afford very slight evidence that it had been properly constructed, and of suitable material. In the case of Mullen v. St. John, *supra,* the building which fell, as reported in that case, was constructed in 1854, and remained standing until 1870, when a part of its walls fell outward into the street, causing the injury to the plaintiff in that action; but it does not appear to have been there claimed that the fact that the building had been in use sixteen years or more constituted any objection to the recovery by the plaintiff.[1]

[1] In Lewis v. Terry, 111 Cal. 39, 43 Pac. 398, 31 L. R. A. 220, 52 Am. St. R. 146 (1896), a folding bed, sold not to plaintiff but to a third person, the court said: "We agree that the action cannot be sustained on the ground of any privity of contract between plaintiff and defendants. for there was none. If a tradesman sells or furnishes for use an article actually unsound and dangerous, but which he believes to be safe, and warrants accordingly, he is not liable for injuries resulting from its defective or unsafe condition to a person who was neither a party to the contract with him, nor one for whose benefit the contract was made. Coughtry v. Woollen Co., 56 N. Y. 127: Heizer v. Manufacturing Co., 110 Mo. 605, 19 S. W. 630; Winterbottom v. Wright, 10 Mees. & W. 109 (the leading case); Shear & R. Neg. § 116; 1 Beven, Neg. p. 60 *et seq.* But when the seller, as in the case made by the complaint before us, represents the article to be safe for the uses it was designed to serve, when he knows it to be dangerous, because of concealed defects, he commits a wrong independent of his contract, and brings himself within the operation of a principle of the law of torts."

HUSET v. J. I. CASE THRESHING MACH. CO.

(120 Fed. 865; 57 C. C. A. 237.—1903.)

SANBORN, Circuit Judge. Is a manufacturer or vendor of an article or machine which he knows, when he sells it, to be imminently dangerous, by reason of a concealed defect therein, to the life and limbs of any one who shall use it for the purpose for which it was made and intended, liable to a stranger to the contract of sale for an injury which he sustains from the concealed defect while he is lawfully applying the article or machine to its intended use?

The argument of this question has traversed the whole field in which the liability of contractors, manufacturers, and vendors to strangers to their contracts for negligence in the construction or sale of their articles has been contested. The decisions which have been cited are not entirely harmonious, and it is impossible to reconcile all of them with any established rule of law. And yet the underlying principle of the law of negligence, that it is the duty of every one to so act himself and to so use his property as to do no unnecessary damage to his neighbors, leads us fairly through the maze. With this fundamental principle in mind, if we contemplate the familiar rules that every one is liable for the natural and probable effects of his acts; that negligence is a breach of a duty; that an injury that is the natural and probable consequence of an act of negligence is actionable, while one that could not have been foreseen or reasonably anticipated as the probable effect of such an act is not actionable, because the act of negligence in such a case is the remote, and not the proximate, cause of the injury; and that, for the same reason, an injury is not actionable which would not have resulted from an act of negligence except from the interposition of an independent cause (Chicago, St. Paul, Minneapolis & Omaha R. Co. v. Elliot, 55 Fed. 949, 5 C. C. A. 347, 20 L. R. A. 582)—nearly all the decisions upon this subject range themselves along symmetrical lines, and establish rational rules of the law of negligence consistent with the basic principles upon which it rests.

Actions for negligence are for breaches of duty. Actions on contracts are for breaches of agreements. Hence the limits of liability for negligence are not the limits of liability for breaches of contracts, and actions for negligence often accrue where actions

upon contracts do not arise, and vice versa. It is a rational and fair deduction from the rules to which brief reference has been made that one who makes or sells a machine, a building, a tool, or an article of merchandise designed and fitted for a specific use is liable to the person who, in the natural course of events, uses it for the purpose for which it was made or sold, for an injury which is the natural and probable consequence of the negligence of the manufacturer or vendor in its construction or sale. But when a contractor builds a house or a bridge, or a manufacturer constructs a car or a carriage, for the owner thereof, under a special contract with him, an injury to any other person than the owner for whom the article is built and to whom it is delivered cannot ordinarily be foreseen or reasonably anticipated as the probable result of the negligence in its construction. So, when a manufacturer sells articles to the wholesale or retail dealers, or to those who are to use them, injury to third persons is not generally the natural or probable effect of negligence in their manufacture, because (1) such a result cannot ordinarily be reasonably anticipated, and because (2) an independent cause—the responsible human agency of the purchaser—without which the injury to the third person would not occur, intervenes, and, as Wharton says, "insulates" the negligence of the manufacturer from the injury to the third person. Wharton on Law of Negligence (2d Ed.) § 134. For the reason that in the cases of the character which have been mentioned the natural and probable effect of the negligence of the contractor or manufacturer will generally be limited to the party for whom the article is constructed, or to whom it is sold, and, perhaps more than all this, for the reason that a wise and conservative public policy has impressed the courts with the view that there must be a fixed and definite limitation to the liability of manufacturers and vendors for negligence in the construction and sale of complicated machines and structures which are to be operated or used by the intelligent and the ignorant, the skillful and the incompetent, the watchful and the careless, parties that cannot be known to the manufacturers or vendors, and who use the articles all over the country hundreds of miles distant from the place of their manufacture or original sale, a general rule has been adopted and has become established by repeated decisions of the courts of England and of this country that in these cases the liability of the contractor or manufacturer for negligence in the construction or sale of the articles which he makes or vends is limited

to the persons to whom he is liable under his contracts of construction or sale. The limits of the liability for negligence and for breaches of contract in cases of this character are held to be identical. The general rule is that a contractor, manufacturer, or vendor is not liable to third parties who have no contractual relations with him for negligence in the construction, manufacture, or sale of the articles he handles. * * * *

In these cases third parties, without any fault on their part, were injured by the negligence of the manufacturer, vendor, or furnisher of the following articles, while the parties thus injured were innocently using them for the purposes for which they were made or furnished, and the courts held that there could be no recovery, because the makers, vendors, or furnishers owed no duty to strangers to their contracts of construction, sale or furnishing: A stagecoach, Winterbottom v. Wright, 10 M. & W. 109; a leaky lamp, Longmeid v. Holliday, 6 Exch. 764, 765; a defective chain furnished one to lead stone, Blackemore v. Ry. Co., 8 El. & Bl. 1035; an improperly hung chandelier, Collis v. Selden, L. R. 3 C. P. 495, 497; an attorney's certificate of title, Bank v. Ward, 100 U. S. 195, 204, 25 L. Ed. 621; a defective valve in an oil car, Goodlander v. Standard Oil Co., 63 Fed. 401, 406, 11 C. C. A. 253, 259, 27 L. R. A. 583; a porch on a hotel, Curtain v. Somerset, 140 Pa. 70, 21 Atl. 244, 12 L. R. A. 322, 23 Am. St. Rep. 220; a defective side saddle, Bragdon v. Perkins-Campbell Co., 87 Fed. 109, 30 C. C. A. 567; a defective rim in a balance wheel, Loop v. Litchfield, 42 N. Y. 351, 359, 1 Am. Rep. 513; a defective boiler, Losee v. Clute, 51 N. Y. 494, 10 Am. Rep. 623; a defective cylinder in a threshing machine, Heizer v. Kingsland & Douglass Mfg. Co., 110 Mo. 605, 615, 617, 19 S. W. 630, 15 L. R. A. 821, 33 Am. St. Rep. 481; a defective wall which fell on a pedestrian, Daugherty v. Herzog, 145 Ind. 255, 44 N. E. 457, 32 L. R. A. 837, 57 Am. St. Rep. 204; a defective rope on a derrick, Burke v. Refining Co., 11 Hun, 354; a defective shelf for a workman to stand upon in placing ice in a box, Swan v. Jackson, 55 Hun, 194, 7 N. Y. Supp. 821; a defective hoisting rope of an elevator, Barrett v. Mfg. Co., 31 N. Y. Super. Ct. 545; a runaway horse, Carter v. Harden, 78 Me. 528, 7 Atl. 392; a defective hook holding a heavy weight in a drop press, McCaffrey v. Mfg. Co. (R. I.) 50 Atl. 651, 55 L. R. A. 822; a defective bridge, Marvin Safe Co. v. Ward, 46 N. J. Law, 19; shelves in a dry goods store, whose fall injured a customer, Burdick v. Cheadle, 26 Ohio St. 393,

20 Am. Rep. 767; a staging erected by a contractor for the use of his employees, McGuire v. McGee (Pa.) 13 Atl. 551; defective wheels, J. I. Case Blow Works v. Niles & Scott Co. (Wis.) 63 N. W. 1013.

In the leading case of Winterbottom v. Wright this rule is placed upon the ground of public policy, upon the ground that there would be no end of litigation if contractors and manufacturers were to be held liable to third persons for every act of negligence in the construction of the articles or machines they make after the parties to whom they have sold them have received and accepted them. In that case the defendant had made a contract with the Postmaster General to provide and keep in repair the stagecoach used to convey the mail from Hartford to Holyhead. The coach broke down, overturned, and injured the driver, who sued the contractor for the injury resulting from his negligence. Lord ABINGER, C. B., said: "There is no privity of contract between these parties; and, if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue."

Baron ALDERSON said: "I am of the same opinion. The contract in this case was made with the Postmaster General alone; and the case is just the same as if he had come to the defendant and ordered a carriage, and handed it at once over to Atkinson. If we were to hold that the plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter the contract. If we go one step beyond that, there is no reason why we should not go fifty."

The views expressed by the judges in this case have prevailed in England and in the United States, with the exception of two decisions which are in conflict with the leading case and with all the decisions to which reference has been made. Those cases are Devlin v. Smith, 89 N. Y. 470, 42 Am. Rep. 311, in which Smith, a painter, employed Stevenson, a contractor, to build a scaffold ninety feet in height, for the express purpose of enabling the painter's workmen to stand upon it to paint the interior of the dome of a building, and the Court of Appeals of New York held that Stevenson was liable to a workman of Smith, the painter, who was injured

by a fall, caused by the negligence of Stevenson in the construction of the scaffold upon which he was working; and Schubert v. J. R. Clark Co., 49 Minn. 331, 51 N. W. 1103, 15 L. R. A. 818, 32 Am. St. Rep. 559, in which a painter purchased of a manufacturer a stepladder, and one of the painter's employees, who was injured by the breaking of a step caused by the negligence of the manufacturer, was permitted to recover of the latter for the injuries he had sustained. The decision in Devlin v. Smith may, perhaps, be sustained on the ground that the workmen of Smith were the real parties in interest in the contract, since Stevenson was employed and expressly agreed to construct the scaffold for their use. But the case of Schubert v. J. R. Clark Co. is in direct conflict with the side-saddle case, Bragdon v. Perkins-Campbell Co., 87 Fed. 109, 30 C. C. A. 567; the porch case, Curtain v. Somerset, 140 Pa. 70, 21 Atl. 244, 12 L. R. A. 322, 23 Am. St. Rep. 220; the defective cylinder case Heizer v. Kingsland & Douglass Mfg. Co., 110 Mo. 617, 19 S. W. 630, 15 L. R. A. 821, 23 Am. St. Rep. 481; the defective hook case, McCaffrey v. Mfg. Co. (R. I.) 50 Atl. 651, 55 L. R. A. 822; and with the general rule upon which all these cases stand.

It is, perhaps, more remarkable that the current of decisions throughout all the courts of England and the United States should be so uniform and conclusive in support of this rule, and that there should in the multitude of opinions, be but one or two in conflict with it, than it is that such sporadic cases should be found. They are insufficient in themselves, or in the reasoning they contain, to overthrow or shake the established rule which prevails throughout the English speaking nations.

But while this general rule is both established and settled, there are, as is usually the case, exceptions to it as well defined and settled as the rule itself. There are three exceptions to this rule.

The first is that an act of negligence of a manufacturer or vendor which is imminently dangerous to the life or health of mankind, and which is committed in the preparation or sale of an article intended to preserve, destroy, or affect human life, is actionable by third parties who suffer from the negligence. Dixon v. Bell, 5 Maule & Sel. 198; Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455; Norton v. Sewall, 106 Mass. 143, 8 Am. Rep. 298; Elkins v. McKean, 79 Pa. 493, 502; Bishop v. Weber, 139 Mass. 411, 1 N. E. 154, 52 Am. Rep. 715; Peters v. Johnson (W. Va.) 41 S. E. 190, 191, 57 L. R. A. 428. The leading case upon this subject is Thomas

v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455. A dealer in drugs sold to a druggist a jar of belladonna, a deadly poison, and labeled it "Extract of Dandelion." The druggist filled a prescription of extract of dandelion, prepared by a physician for his patient. The patient took the prescription thus filled, and recovered of the wholesale dealer for the injuries she sustained. In Norton v. Sewall, 106 Mass. 143, 8 Am. Rep. 298, a recovery was had by a third party for the sale of laudanum as rhubarb; in Bishop v. Weber, for the furnishing of poisonous food for wholesale food; in Peters v. Johnston for the sale of saltpeter for Epsom salts; and in Dixon v. Bell, for placing a loaded gun in the hands of a child. In all these cases of sale the natural and probable result of the act of negligence—nay, the inevitable result of it—was not an injury to the party to whom the sales were made, but to those who, after the purchasers had disposed of the articles, should consume them. Hence these cases stand upon two well-established principles of law: (1) That every one is bound to avoid acts or omissions imminently dangerous to the lives of others, and (2) that an injury which is the natural and probable result of an act of negligence is actionable. It was the natural and probable result of the negligence in these cases that the vendees would not suffer, but that those who subsequently purchased the deleterious articles would sustain the injuries resulting from the negligence of the manufacturers or dealers who furnished them.

The second exception is that an owner's act of negligence which causes injury to one who is invited by him to use his defective appliance upon the owner's premises may form the basis of an action against the owner. Coughtry v. Globe Woolen Co., 50 N. Y. 124, 15 Am. Rep. 387; Bright v. Barnett & Record Co. (Wis.) 60 N. W. 418, 420, 26 L. R. A. 524; Heaven v. Pender, L. R. 11 Q. B. Div. 503; Roddy v. Railway Co., 104 Mo. 234, 241, 15 S. W. 1112, 12 L. R. A. 746, 24 Am. St. Rep. 333. In Coughtry v. Globe Woolen Co., 56 N. Y. 124, 15 Am. Rep. 387, the owner of a building employed Osborn & Martin to construct a cornice, and agreed with them to furnish a scaffold upon which their men could perform the work. He furnished the scaffold, and one of the employees of the contractors was injured by the negligence of the owner in constructing the scaffold. The court held that the act of the owner was an implied invitation to the employees of Osborn & Martin to use the scaffold, and imposed upon him a liability for negligence in its erec-

tion. The other cases cited to this exception are of a similar character.

The third exception to the rule is that one who sells or delivers an article which he knows to be imminently dangerous to life or limb to another without notice of its qualities is liable to any person who suffers an injury therefrom which might have been reasonably anticipated, whether there were any contractual relations between the parties or not. Langridge v. Levy, 2 M. & W. 519, 4 M. & W. 337; Wellington v. Oil Co., 104 Mass. 64, 67; Lewis v. Terry (Cal.) 43 Pac. 398. * * * *

Turning now to the case in hand, it is no longer difficult to dispose of it. The allegations of the complaint are that the defendant prepared a covering for the cylinder of the threshing machine, which was customarily and necessarily used by those who operated it to walk upon, and which was so incapable of sustaining the least weight that it would bend and collapse whenever any one stepped upon it; that it concealed this defective and dangerous condition of the threshing rig so that it could not be readily discovered by persons engaged in operating or working upon it; that it knew that the machine was in this imminently dangerous condition when it shipped and supplied it to the employer of the plaintiff; and that the plaintiff has sustained serious injury through this defect in its construction. The case falls fairly within the third exception. It portrays a negligence imminently dangerous to the lives and limbs of those who should use the machine, a machine imminently dangerous to the lives and limbs of all who should undertake to operate it, a concealment of this dangerous condition, a knowledge of the defendant when it was shipped and supplied to the employer of the plaintiff that the rig was imminently dangerous to all who should use it for the purpose for which it was made and sold, and consequent damage to the plaintiff. It falls directly within the rule stated by Mr. Justice GRAY that when one delivers an article, which he knows to be dangerous to another person, without notice of its nature and qualities, he is liable for an injury which may be reasonably contemplated as likely to result, and which does in fact result therefrom, to that person or to any other who is not himself in fault. The natural, probable, and inevitable result of the negligence portrayed by this complaint in delivering this machine when it was known to be in a condition so imminently dangerous to the lives and limbs of those who should undertake to use it for the purpose for which it was con-

structed was the death, or loss of one or more of the limbs, of some of the operators. It is perhaps improbable that the defendant was possessed of the knowledge of the imminently dangerous character of this threshing machine when it delivered it, and that upon the trial of the case it will be found to fall under the general rule which has been announced in an earlier part of this opinion. But upon the facts alleged in this complaint, the act of delivering it to the purchaser with a knowledge and a concealment of its dangerous condition was so flagrant a disregard of the rule that one is bound to avoid any act imminently dangerous to the lives and health of his fellows that it forms the basis of a good cause of action in favor of any one who sustained injury therefrom.

The judgment of the Circuit Court must be reversed, and the cause must be remanded to the court below for further proceedings not inconsistent with the views expressed in this opinion.

PETERS v. JOHNSON.

(50 W. Va. 644; 41 S. E. 190.—1902.)

BRANNON, J. * * * The circuit court seems to have acted, in its instructions, upon the erroneous theory that if the sale was in fact to McGary, and not to Peters, Peters could not recover. This theory rests upon the reasoning that there was no sale to Peters, no contract, no relation between the plaintiff and defendants, and therefore there was no duty upon the defendants to the plaintiff, the breach of which could give rise to an action. But the law will not sustain this line of reasoning. Can a druggist, from incompetency or negligence, sell to one person the wrong, poisonous article as medicine, which, being taken by such person lying sick in the purchaser's house, inflicts injury upon such third person, without any liability upon that druggist to answer to that third person? The law says he is liable to that third person. We know that drugs and medicines are kept in homes, and may, and probably will, be used by other persons than the one buying. Such is the probable, usual case. Is it possible that there is no reparation to this third person for irreparable harm to him from such incompetency or negligence? Considering the frightful dangers lurking in drugs, poi-

sons, and medicines, this would be a disastrous rule. Is there no duty upon a seller of medicine, as to persons who may use them, beyond the immediate purchaser, simply because there is no contract between the seller and the third person? Where the action is only for the breach of a contract, only the parties to it, or their privies, can maintain it. Strangers cannot sue for its negligent breach. Bank v. Ward, 100 U. S. 195, 25 L. Ed. 621; 1 Shear. & R. Neg. § 116; 2 Jag. Torts, § 290.

But where, in a given transaction, the law puts upon a person the duty to so act that he does not harm others, independent of a contract, he is liable to third parties, even though executing a contract made with a particular person, if he harms others by negligence. The question is, has the defendant broken a duty apart from the contract? If he has simply broken his contract, none can sue him but a party to it; but, if he violated a duty to others, he is liable to them. The single question in a given case is, was there a duty on the part of the defendant to the person suing him? Whence does duty come? The general rule is that, damages only come from what is the natural, reasonable, and probable consequence of an act. If harm may come reasonably and probably to any one from another's action, there is duty on him so to act as to avoid such injury. Now, where a druggist sells medicine to one, is it not probable that it may be taken by others than his immediate vendee; and if the wrong article, and dangerous, is it not probable that others will receive injury? If, under the facts, a common-law duty to third persons exists, a party may be sued by such persons for negligence, incapacity, or misfeasance in performing his contract with another. This is particularly so in respect to a dangerous thing sold. 2 Jag. Torts, § 261; 1 Shear. & R. Neg. § 116; note Insurance Co. v Perrine, 57 Am. Dec. 401. "Apothecaries, druggists, and all persons engaged in manufacturing, compounding, or vending drugs, poisons, or medicines, are required to be extraordinarily skillful, and to use the highest degree of care known to practical men to prevent injury from the use of such articles and compounds." Howes v. Rose (Ind. App.) 42 N. E. 303, 55 Am. St. Rep. 251, and note; Craft v. Parker, Webb & Co. (Mich) 55 N. W. 812, 21 L. R. A. 139; Walton v. Booth, 34 La. Ann. 913, where one sold sulphate of zinc for Epsom salts, and was held to a high standing of liability. Such persons are liable for the slightest negligence, and for ignorance and incapacity. They handle things

dangerous to human life and health, and must be most alert to avoid mistakes, and they are bound to have adequate skill. 2 Shear. & R. Neg. §§ 689, 690.

In Kentucky the rule is that a druggist must know what he sells, and if he departs from the prescription, or ignorantly sells wrong and poisonous hurtful drugs, he is an absolute guarantor, and cannot plead that he has been extraordinarily careful in general. Fleet v. Hollenkemp, 13 B. Mon. 219, 56 Am. Dec. 563. This excludes the question of negligence or ignorance, as irrelevant, and bases the position on the tremendous and imminent danger to the public from the sale of poisons and medicines. It can hardly be said to lay down too rigid a rule, looking to the safety of life; but the authorities generally do admit the question of negligence as material, but they demand the utmost caution and skill above stated. Certainly this duty is demanded as between the parties to the sale, and, upon principles above stated, this duty exists between the seller and third persons also.

A few cases will show this. The leading case is Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455, holding that a manufacturing druggist selling a poisonous drug labeled as harmless is liable to a person who, relying on the erroneous label, and without carelessness, takes the drug as medicine, on the ground of breach of public duty, whether the person injured is the immediate customer or not. The druggist, Winchester, sold wholesale to Aspinall, and he to Foord, and Foord sold by retail to Mrs. Thomas. Winchester was held liable to her. The court said: "The death or great bodily harm of some person was the natural and almost inevitable consequence of the sale of belladonna by means of a false label." The court distinguished between articles of imminently dangerous character and those not of such character, in saying: "The defendant's negligence put human life in imminent danger. Can it be said that there was no duty on the part of the defendant to avoid the creation of that danger by the exercise of greater caution, or that the exercise of that caution was a duty only to his immediate vendee, whose life was not endangered? The defendant's duty arose out of the nature of his business, and the danger to others incident to its mismanagement. Nothing but mischief like that which actually happened could have been expected from sending the poison falsely labeled into the market, and the defendant is justly responsible for the probable consequences of his act. The duty of exercising caution

in this respect did not arise out of the defendant's contract of sale to Aspinall. The wrong done by the defendant was in putting the poison, mislabeled, into the hands of Aspinall, and afterwards used as the extract of dandelion by some person then unknown."

In Bank v. Ward, 100 U. S. 204, 25 L. Ed. 621, it is held that: "Such an act of negligence being imminently dangerous to the lives of others, the wrongdoer is liable to the injured party, whether there be any contract between them or not. Where the wrongful act is not immediately dangerous to the lives of others, the negligent party, unless he is a public agent, is, in general, liable only to the party with whom he contracted, and on the ground that negligence is a breach of contract." This distinction between things imminently dangerous and things not so is drawn in Thomas v. Winchester, cited, and Loop v. Litchfield, 1 Am. Rep. 543. In Norton v. Sewall, 106 Mass. 143, 8 A. M. Rep. 298, it was held that if one sell negligently a poison for a harmless medicine to A., who buys it to administer it to B., and gives a dose to B., which kills him, an action lies for B.'s estate. GRAY, J., said: "This finding includes a violation of duty on the part of the defendant and injury resulting to the intestate, for which the defendant was responsible, without regard to privity of contract betwen them. The case is within Thomas v. Winchester, which has often been approved by this Court." Blood Balm Co. v. Cooper, 83 Ga. 457, 10 S. E. 118, 5 L. R. A. 612, 20 Am. St. Rep. 324, approves Thomas v. Winchester, and holds that one who sells dangerous medicines to a druggist, to be resold, is liable to third parties, as if he himself had sold to them.[1]

[1] See West v. Emanuel, 198 Pa. 180, 47 At. 965 (1901). PER CURIAM. At the close of the plaintiff's case, and on motion of the defendant, the court entered a compulsory nonsuit, which, on application of the plaintiff, it refused to take off. As the evidence introduced by the plaintiff failed to establish or disclose a cause of action against the defendant, the nonsuit was properly entered. The Kohler Headache Powders were in demand at least twelve or fifteen years ago, and from that time on they were to be found for sale in most, if not all, of the principal drug stores. They were recognized and regarded as an efficient and proper remedy for headaches, and were mainly used to relieve them. They were a patent or proprietary medicine, manufactured by Kohler, and sold by him to the drug stores, which sold them to their customers. In the sales of patent or proprietary medicines furnished by the compounder of the ingredients which compose them the druggist is not required to analyze the contents of each bottle or package he receives. If he delivers to the consumer the article called for with the label of the proprietary or patentee upon it, he cannot be justly charged with negligence in so doing. Judgment affirmed.

BISHOP v. WEBER.

(139 Mass. 411.—1885.)

Tort. Writ dated October 29, 1883. The declaration as originally filled contained two counts. On May 19, 1884, a demurrer to the declaration was sustained, and no exception or appeal was taken. At the same term, the declaration was amended by adding a third count, and by inserting certain words in the first and second count. The plaintiff had also leave to amend her writ by adding after the word "tort" the words "or contract, the plaintiff being doubtful to which class of actions this action belongs."

The Superior Court sustained the demurrer and ordered judgment for the defendant; and the plaintiff appealed to this court.

C. ALLEN, J. If one who holds himself out to the public as a caterer, skilled in providing and preparing food for entertainments, is employed as such, by those who arrange for an entertainment, to furnish food and drink for all who may attend it, and if he undertakes to perform the service accordingly, he stands in such a relation of duty towards a person who lawfully attends the entertainment, and partakes of the food furnished by him, as to be liable to an action of tort for negligence in furnishing unwholesome food, whereby such person is injured. This liability does not rest so much upon an implied contract, as upon a violated or neglected duty voluntarily assumed. Indeed, where the guests are entertained without pay, it would be hard to establish an implied contract with each individual. The duty, however, arises from the relation of the caterer to the guests. The latter may have a right to assume that he will furnish for their consumption provisions which are not unwholesome and injurious through any neglect on his part. The furnishing of provisions which endanger human life or health stands clearly upon the same ground as the administering of improper medicines, from which a liability springs irrespective of any question of privity of contract between the parties. Norton v. Sewall, 106 Mass. 143; Longmeid v. Holliday, 6 Exch. 761; Peppin v. Sheppard, 11 Price, 400.

The plaintiff's action was originally entitled "in an action of tort." The plaintiff obtained leave to amend by adding the words "or contract, the plaintiff being doubtful to which class of actions this ac-

tion belongs." This amendment was unnecessary, and may be disregarded, all the amended counts upon which the plaintiff relies being in tort. It is not necessary to sustain the demurrer on account of this lack of literal precision in entitling the action.

The defendant relies on several other extremely fine points of objection, but, without dwelling on them in detail, it may be said, in general terms, that the several counts sufficiently set forth the facts from which the duty of the defendant towards the plaintiff sprung, and it is not necessary to state formally and in terms that the defendant occupied such a relation towards the plaintiff that the law cast upon him the duty; they also sufficiently aver that the defendant neglected that duty, and that the plaintiff was injured by reason thereof. It is not necessary to aver that the defendant knew of the injurious quality of the food. It is sufficient if it appears that he ought to have known of it, and was negligent in furnishing unwholesome food, by reason whereof the plaintiff was injured.

Judgment reversed.

HIGGINS v. McCABE.

(126 Mass. 13.—1878.)

Tort. The declaration alleged that the defendant while employed as midwife by plaintiff's mother, pretending to be competent and skillful in treating diseases of the eyes, such as plaintiff then had, undertook the treatment of plaintiff, and so negligently and unskillfully treated the plaintiff that the plaintiff became totally blind.

COLT, J. This action proceeds upon the ground that the defendant failed to discharge a legal duty which she owed the plaintiff, resulting in the injury complained of. The question is whether the evidence relied on by the plaintiff would justify a verdict in favor of the child; and, in the opinion of a majority of the court, it would not. It appears that the defendant was originally employed only as a midwife. The parents had employed her twice before in that capacity. There was no competent evidence that the treatment of diseases of the eyes which might be developed in the child was embraced in the duties which the defendant undertook as midwife; and there is no evidence that the defendant was unskillful or negligent

in the performance of any of the duties with which she was properly chargeable in that capacity.

But it is insisted that, independently of the employment as midwife, the jury upon this evidence might properly find that the defendant, professing to have superior skill and experience, held herself out as competent to cure this particular disease, and thereupon was permitted by the mother to assume the treatment of it. The evidence on which it is sought to charge the defendant with this additional duty is found in the testimony of the mother; and that testimony must be construed with reference to the character and relation of the parties, and the admitted facts in the case. The services of the defendant in respect to the cure of this disease were wholly gratuitous; they were performed as acts of benevolence only. The defendant was a midwife; the jury would not be justified in finding that she claimed to possess, or might reasonably be expected from her calling to have, the peculiar knowledge, skill, and experience of an expert in such matters. The representations of the defendant, that she could cure the child with simple remedies and washes, that she had cured other children in the same way who were similarly afflicted, and that there was no need of a doctor, were but the expression of an opinion as to the efficacy of her remedies, and did not imply that she undertook to use that higher skill of the medical profession which is required in the treatment of the more complicated and delicate organs. The question was whether she had discharged the duty which she assumed with that skill she professed to have, and with that diligence which might reasonably have been expected of her. Upon that question, the fact that the service was rendered without compensation must have an important if not decisive bearing.

It is often said, that a gratuitous agent is liable for gross negligence only; but, without regard to degrees of negligence, it is plain that the duty imposed upon such an agent is less stringent than when the service undertaken is founded upon a consideration paid.

Under the rule requiring ordinary care as applied to this case, we see no evidence of neglect in any degree. A physician must apply the skill and learning which belong to his profession; but a person who, without special qualifications, volunteers to attend the sick, can at most be only required to exercise the skill and diligence usually bestowed by persons of like qualifications under like circumstances. To hold otherwise would be to charge responsibility in

damages upon all who make mistakes in the performance of kindly offices for the sick. Gill v. Middleton, 105 Mass. 477, 479; Leighton v. Sargent, 11 Foster, 119; Simonds v. Henry, 39 Maine, 155; Lanphier v. Phipos, 8 C. & P. 475; Hancke v. Hooper, 7 C. & P. 81.

The defendant was attentive and diligent in her treatment of the child, and in the use of the remedies she proposed. There was evidence, it is true, from regular physicians, that, if other and more powerful remedies had been seasonably applied, they would probably have effected a cure; but these were remedies known to the medical profession, of which the defendant neither had nor professed to have knowledge. It was not a case where the defendant, as in the cases cited by the plaintiff, assumed to act as a regular surgeon or a regular practitioner. Ruddock v. Lowe, 4 F. & F. 519; Jones v. Fay, 4 F. & F. 525.

DUBOIS v. DECKER.

(130 N. Y. 825.—1891.)

HAIGHT, J. This action was brought to recover damages of the defendant, a physician and surgeon, for alleged malpractice suffered by the plaintiff while undergoing treatment as a patient. On the 1st day of December, 1889, the plaintiff undertook to jump on to an engine of the Ulster & Delaware Railroad, in the city of Kingston, and in doing so slipped, and his left foot was caught by the tender, and a portion thereof crushed. Being destitute, he was taken to the city almshouse, where he was treated by the defendant, who was one of the city physicians having the care of the patients therein, and who was employed for that purpose. Thereafter, and on the 10th day of December, he amputated the plaintiff's leg above the ankle-joint, and six or seven days thereafter, gangrene having set in, he again amputated the leg, at the knee-joint. After the second amputation the leg did not properly heal, but became a running sore, and at the time of the trial the bone protruded some three or four inches. Evidence was given upon the trial from which the jury might find that the bones of the foot were so crushed that immediate amputation of the injured portions was necessary, and that the appearance of gangrene was in consequence of the delay of ten days in the

operation; and that in the second operation the defendant neglected to save flap enough to cover the end of the limb and bone, and that the subsequent protrusion of the bone was owing to this neglect. The question of the defendant's liability consequently became one for the jury. We are aware that he claimed to have waited ten days before operating for the purpose of seeing whether the foot could not be saved, and that a physician and surgeon will not be held liable for mere errors in judgment. But his judgment must be founded upon his intelligence. He engages to bring to the treatment of his patient, care, skill, and knowledge, and he should have known the probable consequences that would follow from the crushing of the bones and tissues of the foot. * * * *

The defendant moved to dismiss the complaint upon the ground that it failed to show a contract relation between the parties, whereby the defendant was employed to attend the plaintiff, and that no facts were alleged showing it to be the duty of the defendant to treat him in a skillful manner. This motion being denied, the defendant asked the court to charge that, as the defendant treated the plaintiff gratuitously, he is liable, if at all, only for gross negligence, which was refused. It has been held that the fact that a physician or surgeon renders services gratuitously does not affect his duty to exercise reasonable and ordinary care, skill, and diligence. McCandless v. McWha, 22 Pa. St. 261–269; McNevins v. Lowe, 40 Ill. 209; Gladwell v. Steggall, 5 Bing. N. C. 733. But we do not deem it necessary to consider or determine this question, for it appears that the plaintiff's services were not gratuitously rendered. He was employed by the city as one of the physicians to attend and treat the patients that should be sent to the almshouse. The fact that he was paid by the city instead of the plaintiff did not relieve him from the duty to exercise ordinary care and skill.

The judgment should be affirmed, with costs.

Whoever assumes the care of a thing is liable if he fails to care for it reasonably.

JAGER v. ADAMS.

(123 Mass. 26.—1877.)

COLT, J. The plaintiff was struck by a falling brick, or part of a brick, while passing along the sidewalk in front of a building in process of erection, upon the front wall of which, in an upper story, the defendant, who was doing the mason work of the building under a contract, had men at work laying brick from the inside. The plaintiff contended that the defendant was liable for not preventing the approach of foot passengers by suitable barriers across the walk, and also for allowing his men to work in that place without protection in front, to prevent the falling of brick or other material upon the thoroughfare below.

There was evidence, consisting in part of the defendant's admissions, from which the jury might have found that the brick was dropped by one of the defendant's men, or fell off the wall at the point where they were at work. And it was possible for them to find that the immediate falling was not shown to have been due to any act which, considering the nature of the employment, could be called the negligent act of the men at work, or of any one of them. To meet this aspect of the case, the plaintiff asked the court to rule that, even if the brick fell by accident, the defendant might be liable for neglect in putting men to handle brick where a passing traveler would be liable to injury from it. The court refused this, and, while instructing the jury that the plaintiff must satisfy them that her injury was the result of fault or negligence of the defendant or of some person in his employ, also told them that, if the falling of the brick was the result of an accident, and not of any negligence of defendant's servants, he was not liable; and that the mere fact that a piece of brick fell from the building that the defendant was erecting would not justify the jury in presuming that he was guilty of a lack of reasonable care.

But it is a matter of common knowledge and experience, that, when men are breaking and handling bricks in the construction of such a wall, some of the material may fall, although the workmen, in fitting and laying it, are in the exercise of ordinary care. The immediate cause of the fall in such case may indeed be accidental, but it is an accident which the builder of the wall, in view of the

danger to life and limb, may be bound to contemplate and provide against by safeguards or barriers, so that the traveler may not be exposed to injury; not to do so would be an "omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do." ALDERSON, B., in Blyth v. Birmingham Waterworks, 11 Exch. 781, 784.

The jury found that the plaintiff had failed to prove that the brick which struck the plaintiff fell through the negligence or carelessness of the defendant or his agents or employees, and returned a verdict for the defendant. In view of the plaintiff's request, which sufficiently, though imperfectly, called the attention of the court to the distinctions above stated, and the instruction which was actually given as to the accidental falling of the brick, with the form of the finding by the jury, we think the jury may have misunderstood or been misled by the rulings of the court, and the entry must be.

Exceptions sustained.[1]

[1] The owner of property abutting on the highway is liable for damages caused by the falling of a rotten limb from a tree belonging to him, though standing in the street, even when he is ignorant that he owns the tree, Weller v. McCormick, 52 N. J. L. 470. Whether the landlord is liable for damages sustained by plaintiff's falling into a coal hole temporarily unguarded, depends upon whether he has surrendered the premises entirely to the control of tenants; Jennings v. Van Schaick, 108 N. Y. 530; Trustees of Canandaigua, 156 N. Y. 354, 50 N. E. 971, 66 Am. St. R. 575, 41 L. R. A. 554. In West Chicago Masonic Assoc. v. Cohn, 192 Ill. 210, 61 N. E. 439 (1901), it is said: "The general rule is that the occupant of premises is responsible for injuries inflicted upon another by reason of the neglect or failure to keep the premises in repair; City of Chicago v. O'Brennan, 65 Ill. 160; Gridley v. City of Bloomington, 68 Ill. City of Boston v. Gray (Mass.) 10 N. E. 509. This court has recognized exceptions to this general rule, as follows: The owner of leased premises may be made liable for such injuries: (a) If the covenants of the lease require that he shall keep the premises in repair; (b) if the dangerous or defective condition by which the injury was occasioned existed when the premises were leased; (c) if that which occasioned the injury was a nuisance, and was upon the premises when the lease was executed. Gridley v. City of Bloomington, *supra*; City of Chicago v. O'Brennan, *supra*; City of Peoria v. Simpson, 110 Ill. 294, 51 Am. Rep. 683."

LAND v. FITZGERALD.

(68 N. J. L. 28: 52 At. 229.—1902.)

VAN SYCKEL, J. The declaration in this case contains three counts. The first count alleges that the defendant was the owner of a dwelling house on which he had carelessly constructed and maintained a chimney which was insecure and dangerous by reason of its negligent and improper construction; that the danger was known to the defendant and was not patent or known to the plaintiff; that the defendant rented a portion of the said house to the plaintiff, who entered into possession and was injured in the falling of said chimney. The second count alleges that the defendant was the owner of a dwelling house on which he had carelessly constructed and maintained a chimney which was insecure and dangerous; that the danger was known to the defendant, but was not patent or known to the plaintiff; that the plaintiff was upon the premises by the invitation of the defendant, and while so there the said chimney, by reason of its faulty and careless construction, fell upon and injured the plaintiff. The third count alleges that the defendant was the owner of a dwelling house on which he had negligently constructed and maintained a chimney which was insecure and dangerous; that the danger was known to the defendant, but was not patent or known to the plaintiff; that the plaintiff was lawfully upon said premises, and while so there the said chimney fell upon and injured him. To each of these counts the defendant demurred.

Mr. Justice DEPUE, in his elaborate opinion in Clyne v. Helmes, 61 N. J. Law, 358, 39 Atl. 767, shows that it is well-settled law that on a demise of a house or lands there is no contract or condition implied that the premises shall be fit and suitable for the use for which the lessee required them. He cites with approval the declaration of Chief Justice EARL in Robbins v. Jones, 15 C. B. (N. S.) 221, that a landlord who lets a house in a dangerous state is not liable to the tenants, customers, or guests for accidents happening during the term, for, fraud apart, there is no law against letting a tumbledown house, and the tenant's remedy is upon his contract, if any. He also adopted the views of Mr. Justice DIXON in Mullen v. Rainear, 45 N. J. Law, 520, that there is no implied duty on the owner of a house which is in a ruinous and unsafe condition to in-

form a proposed tenant that it is unfit for habitation, and no action will lie against him for an omission to do so in the absence of express warranty or deceit. In that case the injury was occasioned by the breaking of a balcony connected with the demised premises. The authority of these cases is fully recognized by the court of errors and appeals in Railroad Co. v. Reich, 61 N. J. Law, 635, 40 Atl. 682, 41 L. R. A. 831, 68 Am. St. Rep. 727. To this count the demurrer is well taken; it shows no breach of duty for which an action will lie.

The second count presents a different question. The allegation there is that the plaintiff was upon the premises by the invitation of the defendant, not that the plaintiff was his tenant. The law is equally well settled that, where the entry upon the owner's premises is made by his invitation, either express or implied, he is required to use reasonable care to have his premises in a safe condition. Phillips v. Library Co., 55 N. J. Law, 307, 27 Atl. 478; Railroad Co. v. Reich, 61 N. Y. Law, 635, 40 Atl. 682, 41 L. R. A. 831, 68 Am. St. Rep. 727. The invitation and the negligence being sufficiently alleged, the second count discloses a good cause of action, and the demurrer should be overruled.

The third count alleges simply that the plaintiff was lawfully upon the premises at the time he was injured. In Mathews v. Bensel, 51 N. J. Law, 30, 16 Atl. 195, Chief Justice BEASLEY delivered the opinion of the court, holding that, in an action for injuries received in the manufactory of the defendants, the general allegation that plaintiff was lawfully on the premises is sufficient to show that he was not a trespasser. The facts from which such right proceeds need not be stated, but such general allegation will not show that he was there with greater right than that of a mere licensee. The right, therefore, which the plaintiff shows by the third count, is the right to be upon the premises merely by license. The only duty which the owner of land owes to a person who is upon his premises as a licensee only is to refrain from acts willfully injurious. Phillips v. Library Co., 55 N. J. Law, 307, 27 Atl. 478; Taylor v. Turnpike Co., 65 N. J. Law, 103, 46 Atl. 757; Railroad Co. v. Reich, 61 N. J. Law, 635, 40 Atl. 682, 41 L. R. A. 831, 68 Am. St. Rep. 727.

No injurious act or an intentional or willful character is imputed to the defendant in the third count, and the demurrer to that count is therefore sustained. Costs will not be allowed to either side.

WILCOX v. ZANE.

(167 Mass. 302: 45 N. E. 923.—1897.)

Action to recover for personal injuries. The trial judge directed a verdict for defendant that the close of plaintiff's evidence, and plaintiff brings exceptions.

KNOWLTON, J. The evidence tended to show that the roof where the plaintiff was injured was retained in the possession of the defendant as a place to be used in common by his tenants in the building for hanging clothes to dry, and for other uses to which the yard of a dwelling house is commonly put. It was, therefore, his duty to keep it in a reasonably safe condition for the uses for which it was intended. Looney v. McLean, 129 Mass. 33; Marwedel v. Cook, 154 Mass. 235, 28 N. E. 140; Watkins v. Goodall, 138 Mass. 533; Miller v. Hancock (1893) 2 Q. B. 177. The plaintiff was a boarder with Mrs. Pray, one of the defendant's tenants, who, by contract with the defendant's agent, had a right to use the roof in common with others. At Mrs. Pray's request, she went upon the roof to do work for Mrs. Pray, which she had a right to do there under her contract with the defendant. Although she was working gratuitously, she was, in a sense a servant or agent of Mrs. Pray, and she went upon the roof in Mrs. Pray's right. Barstow v. Railroad Co., 143 Mass. 535, 536, 10 N. E. 255. The use which the tenants might make of the roof was not limited to working there in person. The implied invitation growing out of the defendant's contract extended to the agents and servants of the tenants who went upon the roof to do work which the tenants were authorized to do there. The defendant had an interest in the use to which the roof was being put, for he received pay from his tenants for the privilege of so using it. Upon the evidence in this case the defendant owed the plaintiff the same duty to have the roof reasonably safe at the time of the accident that he owed to Mrs. Pray. Plummer v. Dill, 156 Mass. 429, 31 N. E. 128; Hart v. Cole, 156 Mass. 475, 31 N. E. 644.

There was evidence from which the jury might have found that he failed in the performance of this duty. It is clear that it was not necessary to have a very strong floor, for, if one broke through it, his foot could not descend more than about four inches before it would be stopped by the roof below. As the danger of injury was

small if a board broke, a greater risk of breaking was allowable than if a break would be likely to be attended by serious consequences. But there was evidence that the board which broke was badly decayed, and was cross-grained and knotty, and that no repairs had been made on the roof for more than two years. We think that the pieces of broken board which were in evidence, the photographs, and the testimony of the witnesses, presented a question for the jury on this branch of the case. We cannot say, as matter of law, that there was no evidence that the plaintiff was in the exercise of due care. She testified that she had never noticed the dangerous condition of the roof at the place of the accident, and she was in the performance of her duty in the usual way. She had no such duty to observe the condition of the roof in regard to safety as the defendant had.

Exceptions sustained.

ELLSWORTH v. METHENEY.

(104 Fed. 119.—1900.)

DAY, Circuit Judge. This action, brought in the state court, and thence removed to the circuit court of the United States, seeks the recovery of damages by the administratrix of John Metheney, deceased, against James W. Ellsworth, an operator of a certain coal mine in which, on or about the 7th day of October, 1896, John Metheney came to his death. * * * *

While we think there was error in treating the case as one turning upon the duty owing by the employer to the employee injured in the course of his duty, we think there is an aspect of the case which might properly have been submitted to the jury. There was testimony tending to show that the entry in which Metheney was killed was a place where the miners were accustomed to go at noon for the purpose of eating their dinners and for social intercourse; that this had been the practice in the mine, with the knowledge and without objection from the owner. In such a case, what is the measure of obligation on the part of the employer, and in what relation to him does the employee stand? Certainly not as a mere stranger, to whom no duty is owing. It is shown to be customary to use the

entry as a place where the men come from their rooms during the short time of refreshment and rest permitted to them in the course of the day's labor. The master, knowing that the entry was so used, and not objecting thereto, impliedly licenses the men to use the place in this manner. The testimony tended to show that the electric wire, in the condition which it was permitted to be, was highly dangerous to life. The entry in which the men congregated had thus introduced into it an apparatus dangerous to life, but partially disclosed in the darkness of the mine, and strung along the wall, set out therefrom, so that the men using the entry might come into contact therewith. Admitting that, while not engaged in the course of his ployment, Metheney was not entitled to the protection of an employee, he was, nevertheless, a licensee using the entry with the implied consent of the employer. Under such circumstances, we do not think the employer can be permitted without responsibility to introduce a highly dangerous apparatus into a place thus used with his consent. We think the case in this particular is ruled by the principles laid down by this court in the case of Felton v. Aubrey, 20 C. C. A. 436, 74 Fed. 350. In that case Judge LURTON, giving the opinion, quotes the following language from Bennett v. Railroad Co., 102 U. S. 577, 26 L. Ed. 235: "That the owner or occupant of land, who, by invitation, expressed or implied, induces or leads others to come upon his premises, for any lawful purpose, is liable in damages to such persons, they using due care, for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him, and not to them, and was negligently suffered to exist, without timely notice to the public, or to those who were likely to act upon such invitation."

And the judge goes on to say: "It seems to us that many of the American cases which we have cited failed to draw the proper distinction between the liability of an owner of premises to persons who sustain injuries as a result of the mere condition of the premises, and those who come to harm by reason of subsequent conduct of the licensor inconsistent with the safety of persons permitted to go upon the premises, and whom he was bound to anticipate might avail themselves of his license. This distinction seems to be sharply emphasized in the case of Corby v. Hill, 4 C. B. (N. S.) 562, and is a distinction which should not be overlooked. If there be any substantial difference between the legal consequence of permitting another to use one's premises and inviting or inducing such use, the

distinction lies in the difference between the active and the merely passive conduct of such a proprietor. It may be entirely consistent with sound morals and proper regard for the rights of others that the owner of the premises should not be held liable to one who goes upon another's premises for his own uses, and sustains some injury by reason of the unfitness of the premises for such uses, not subsequently brought about by the active interference of the owner. If such person goes there by mere sufferance or naked license, it would seem reasonable that he should pick his way, and accept the grace, subject to the risks which pertain to the situation. But, on the other hand, if, with knowledge that such person will avail himself of the license, the owner actively change the situation by digging a pitfall, or opening a ditch, or obstructing dangerously the premises which he has reason to believe will be traversed by his licensee, sound morals would seem to demand that he should give reasonable warning of the danger to be encountered."

Applying the doctrine herein stated to the facts developed in the present case, we do not perceive why the owner of the mine who actually changes the situation of previous safety by introducing an electric wire insufficiently insulated to prevent injury to those who may come in contact therewith, in a place where he knows or has the means of knowing that the workmen are likely to congregate, is not equally liable with the owner of premises who may "actively change the situation by digging a pitfall, or opening a ditch, or obstructing dangerously the premises which he has reason to believe will be traversed by his licensee." In the case at bar, as well as in the one put by Judge LURTON, we are of opinion that sound morals and just treatment demand that the licensee shall have notice of the new danger which he is likely to encounter in using the premises. In taking this view of the case, we are not undertaking to determine that the facts warrant a recovery on the line herein indicated. That is a question to be developed by testimony upon issue joined with proof directed to a case based upon this theory. Enough is shown to warrant an expression of these conclusions in view of a retrial of the case. What we intend to hold is that if the testimony shall warrant the finding that the electrical apparatus as actually introduced into the mine was dangerous to the life and safety of the employees, and they were ignorant of the dangers thereof, or could not know them in the exercise of ordinary care to avoid injury, and the same was placed in a part of the mine which the men were ac-

customed to use and occupy during the hour of rest and refreshment when not actively engaged in their duties, with the knowledge and consent of their employer, a duty is imposed upon the employer, in thus introducing into his mine a new and dangerous element, to properly guard and protect the same, or to give notice of the danger to those whom he should reasonably apprehend are likely to be brought into contact therewith.

For the error in treating the case as one where an injury happened to one in the course of his employment, and charging the jury upon that theory, the case will be reversed and remanded, for further proceedings consistent with the views herein expressed.

CHRISTIAN v. ILL. CENT. RY.

(71 Miss. 237.—1894.)

COOPER, J. We will not review particularly the sixteen instructions asked and received by the defendant. Some of them may be correct, but throughout them as a whole runs the wholly erroneous proposition that the mere negligent injury of a trespasser by the servants of a railway company is not ground of action by the trespasser. Under the sixth instruction the jury was, in effect, told that the plaintiff could not recover unless the engineer intentionally or purposely ran him down. If that were true, the plaintiff, being a trespasser, must show such injury that, if it had resulted in his death, the servant of the company inflicting the injury would be guilty of murder. By the seventh instruction the jury was told that the plaintiff could not recover unless the conduct of the defendant's servant "was regardless of consequences, and without effort to prevent injury." The true rule is that the servants of the company are not bound to keep a lookout for trespassers, but, if they see one, and appreciate his danger, and that he cannot, by the exercise of reasonable effort, extricate himself, then they in turn must exercise reasonable care to prevent injury to him, and what is such reasonable care is a question of fact determinable by the circumstances. Jamison v. Railroad Co., 63 Miss. 33; Railroad Co. v.

Williams, 69 Miss. 631; Railroad Co. v. Watly, 69 Miss. 145; Railroad Co. v. Cooper, 68 Miss. 368.

Judgment reversed.[1]

PALMER v. GORDON.

(173 Mass. 410; 53 N. E. 909.—1899.)

HOLMES, J. This is an action of tort for personal injuries. We are to take it that the plaintiff, a boy, was a trespasser, with some other boys, in the kitchen attached to the defendant's restaurant, and that the defendant spilled water upon the stove for the purpose of frightening the boys away. He did not intend to scald them, but the water flew from the stove upon the legs of the boys. The question raised by the exceptions is whether the jury were warranted in finding the defendant liable.

It will be seen that this case falls between the cases of spring guns and the like, where the defendant is or may be in the same position as if he had been personally present, and had shot the plaintiff, and the cases where, as against trespassers or licensees, railroads are held entitled to run trains in their usual way without special precautions. Chenery v. Railroad Co., 160 Mass. 211, 213, 35 N. E. 554. In the case at bar the defendant, although not contemplating or intending actual damage, did an act specially contemplating the plaintiff's presence, and directed against him. He left the safe position of a landowner, simply pursuing his own convenience, and

[1] "If the child might be regarded as a trespasser, the defendants would not be relieved by that fact from exercising ordinary care to prevent injuring him after they discovered, or ought to have discovered, his presence there. Edgerly v. Railroad, 67 N. H. 312, 36 Atl. 558; Mitchell v. Railroad, 68 N. H. 96, 34 Atl. 674; Buch v. Armory Mfg. Company, 69 N. H. 257, 260, 261, 44 Atl. 809, 76 Am. St. Rep. 163; Wheeler v. Railway, 70 N. H. 607, 50 Atl. 103, 54 L. R. A. 955. If the motorman had no reason to suppose a child would be trespassing upon the track (Shea v. Railroad, 69 N. H. 361, 41 Atl. 774), he might have discovered the child's presence on or dangerously near to the track while looking for persons whom the defendants, by providing the crossing, invited to use it, Pickett v. Railroad, 117 N. C. 616, 23 S. E. 264, 30 L. R. A. 257, 53 Am. St. Rep. 611. The discovery of the child's presence would be the material fact, not the manner or the cause of making the discovery;" Carney v. Concord St. Ry. 72 N. H. 364, 57 At. 218 (1903.)

assuming that no one would break the law, and thereby bring himself into danger.

Just as a man may make himself liable to a negligent plaintiff by a later negligence, Pierce v. Steamship Co., 153 Mass. 87, 89, 26 N. E. 415, he may make himself liable to a trespasser by an act that is done with reference to the trespasser's presence, and that sufficiently clearly threatens the danger which it brings to pass. A trespasser is not *caput lupinum*. In the present case the only element of doubt was whether the danger to the plaintiff was sufficiently obvious under the circumstances. That question properly was left to the jury.

Exceptions overruled.

ILLINOIS CENT. R. CO. v. LEINER.

(202 Ill. 624; 67 N. E. 398.—1903.)

MAGRUDER, C. J. Upon the trial of this case no instructions were asked by the appellee. The appellant presented to the trial court twenty-three instructions to be given to the jury, of which twelve were given as asked, and eleven were refused. No complaint is made as to the action of the trial court in the admission or exclusion of evidence. Substantially the only question in the case is that which arises from the refusal of the trial court to instruct the jury to find for the defendant. Nearly all the instructions asked by the appellant, and given in its behalf, left it to the jury to determine whether the servants of the appellant in charge of the trains which collided, or any of them, were at the time guilty of such willful and wanton misconduct as directly contributed to the death of appellee's intestate, William A. Wing. * * * *

Second. Whether, therefore, the deceased was a trespasser or not, the question remains whether there is evidence tending to show that he was killed through the wanton or reckless conduct of the appellant's employees who were in charge of the trains whose collision caused his death.

The question whether a personal injury has been inflicted by willful or wanton conduct or gross negligence is a question of fact to be determined by the jury. In Chicago, Burlington & Quincy Railroad Co. v. Murowski, 179 Ill. 77, 53 N. E. 572, we said (page 80, 179

Ill., and page 573, 53 N. E.): "Whether the defendant was guilty of willful or wanton conduct or gross negligence was purely a question of fact for the jury to determine from all the evidence, introduced by the respective parties, bearing upon that point in the case, and it was not the province of the court to inform the jury that some particular fact in the case was conclusive of that question." See, also, Odin Coal Co. v. Denman, 185 Ill. 413, 57 N. E. 192, 76 Am. St. Rep. 45; Carterville Coal Co. v. Abbott, 181 Ill. 495, 55 N. E. 131; Lake Shore & Michigan Southern Railway Co. v. Bodemer, 139 Ill. 596, 29 N. E. 692, 32 Am. St. Rep. 218.

It is not always easy to define what degree of negligence the law consider equivalent to a willful or wanton act. The character of an act, as being willful or wanton, is greatly dependent upon the particular circumstances of each case. In the case of an injury to a trespasser, a railroad company has been said to be liable for "such gross negligence as evidences willfulness." Illinois Central Railroad Co. v. Godfrey, 71 Ill. 500, 22 Am. Rep. 112. Such gross negligence as evidences willfulness is "such a gross want of care and regard for the rights of others as to justify the presumption of willfulness or wantonness. It is such gross negligence as to imply a disregard of consequences or a willingness to inflict injury. Lake Shore & Michigan Southern Railway Co. v. Bodemer, 139 Ill. 596, 29 N. E. 692, 32 Am. St. Rep. 218.

To constitute willful and wanton negligence, it is not always necessary to prove that the defendant's servants are actuated by ill will towards the plaintiff. In East St. Louis Connecting Railway Co. v. O'Hara, 150 Ill 580, 37 N. E. 917, we said (page 585, 150 Ill., and page 919, 37 N. E.): "If it be true, as the evidence tends to show, that the defendant's servants, at the time plaintiff was injured, were running their engine in the dark, without a headlight, or a bell ringing, and at a high and dangerous rate of speed, along a much-frequented street, and where many persons were likely to be passing on their way to the ferry landing or otherwise, such acts would be liable to the construction of being in wanton and willful disregard of the rights and safety of the public generally, so as to amount in law to wanton and willful negligence. And it was not necessary, in order to raise an inference of such negligence, to prove that that the defendant's servants were actuated by ill will, directed specifically towards the plaintiff, or to have known that he was in such position as to be likely to be injured."

In Elgin, Joliet & Eastern Railway Co. v. Duffy, 191 Ill. 489, 61 N. E. 432, we said (page 492, 191 Ill., and page 432, 61 N. E.): "The declaration charges the defendant with willfully and maliciously inflicting the injury. If the record discloses any evidence tending to support that averment, negligence on the part of the appellee, if conceded, would not excuse the appellant. Lake Shore & Michigan Southern Railway Co. v. Bodemer, 139 Ill. 596, 29 N. E. 692, 32 Am. St. Rep. 218. The evidence tends to prove that the train was going at a high rate of speed around a sharp curve, where the view was obstructed by an embankment, approaching a street which was much traveled, giving no warning by the ringing of the bell or sounding the whistle; and this testimony, without passing upon its weight, or whether it was overcome by other evidence, tended to prove the charge of willfulness and wantonness in the management of the train. The jury might well have based its verdict upon that theory of the case."

In Odin Coal Co. v. Denman, 185 Ill. 413, 57 N. E. 192, 76 Am. St. Rep. 45, we said (page 418, 185 Ill., and page 194, 57 N. E.): "'Willful' is a word of familiar use in every branch of law, and, although in some branches of law it may have a special meaning, it generally, as used in courts of law, implies nothing blamable, but merely that the person of whose action or default the expression is used is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this: that he knows what he is doing, and intends to do what he is doing, and is a free agent."

In Carterville Coal Co. v. Abbott, 181 Ill. 495, 55 N. E. 131, we said (page 502, 181 Ill. and page 134, 55 N. E.): "Where an owner, operator, or manager so constructs or equips his mine that he knowingly operates it without conforming to the provisions of this act, he willfully disregards its provisions, and willfully disregards the safety of miners employed therein."

The court gave to the appellant, at its request, upon the trial below, the following instructions: * * * *

"(5) The court instructs the jury that what is meant by 'willful and wanton misconduct' is such conduct as amounts to an intentional wrong, or of such a reckless character as shows that the person or persons guilty of such misconduct were at the time acting in such a manner as shows that they had an utter disregard for the safety and lives of other persons."

In its own instructions the appellant thus defines "willful and wanton conduct" as being conduct "of such a reckless character as shows that the person or persons guilty of such misconduct were at the time acting in such a manner as shows that they had an utter disregard for the safety and lives of other persons." A careful examination of the testimony in this case will reveal the fact that there was sufficient evidence tending to prove such wanton and willful misconduct on the part of the servants in charge of these two trains as to justify a submission of the question to the jury; and, of course, the finding of the jury is conclusive upon the court.

CITY OF PEKIN v. MCMAHON.

(154 Ill. 141; 39 N. E. 484.—1895.)

MAGRUDER, J. 1. The main question in the case arises out of the refusal of the trial court to give the second and third instructions asked by the defendant. Is an individual landowner obliged to respond in damages for the death of a child occurring upon his premises under such circumstances as are developed by the testimony in this case? The general rule is well settled that the private owner or occupant of land is under no obligations to strangers to place guards around excavations upon his land. The law does not require him to keep his premises in safe condition for the benefit of trespassers, or those who come upon them without invitation, either express or implied, and merely to seek their own pleasure, or gratify their own curiosity. 1 Thomp. Neg. p. 303; 2 Shear. & R. Neg. (4th Ed.) § 715. An exception, however, to this general rule exists in favor of children. Although a child of tender years, who meets with an injury upon the premises of a private owner, may be a technical trespasser, yet the owner may be liable, if the things causing the injury have been left exposed and unguarded, and are of such a character as to be an attraction to the child, appealing to his childish curiosity and instincts. Unguarded premises, which are thus supplied with dangerous attractions, are regarded as holding out implied invitations to such children.

There is a conflict in the decisions upon this subject, some courts holding in favor of the liability of the owner, and others ruling

against it. Where the land of a private owner is in a thickly settled city, adjacent to a public street or ally, and he has upon it, or suffers to be upon it, dangerous machinery, or a dangerous pit or pond of water, or any other dangerous agency, at a point thereon near such public street or alley, of such a character as to be attractive to children of tender years, incapable of exercising ordinary care, and he is aware or has notice of its attractions for children of that class, we think that he is under obligations to use reasonable care to protect them from injury when coming upon said premises, even though they may be technical trespassers. To charge him with such an obligation under such circumstances is merely to apply the well-known maxim, "*Sic utere tuo ut alienum non laedas.*" It is true, as a general rule, that a party guilty of negligence is not liable if he does not owe the duty which he has neglected to the person claiming damages. Williams v. Railroad Co., 135 Ill. 491, 26 N. E. 661. But, although the private owner may owe no duty to an adult under the facts stated, the cases known as the "Turntable Cases" hold that such duty is due from him to a child of tender years.

The leading one of the turntable cases is Railroad Co. v. Stout, 17 Wall. 657. There the company was held liable in an action by a child about six years old, who had injured his foot while playing with a turntable belonging to the company, although it was contended that he was a trespasser, and had received the injury because of his own negligence, and that the company owed him no duty; it appearing that the turntable was located upon the private grounds of the company, in a settlement of from 100 to 150 persons, about 80 rods from the depot, near two traveled roads, and was a dangerous machine, and was not guarded or fastened, and that a servant of the company had previously seen boys playing there, and had forbidden them to do so. And it was further held that the care and caution required of a child is according to his maturity and capacity, and is to be determined by the circumstances of each case; that the fact of the child being a technical trespasser made no difference in his right of recovery; that the question of the defendant's negligence was one for the jury to determine; and that the jury were justified in believing that children would probably resort to the turntable, and that the defendant should have anticipated their resort to it from the fact that several boys were at play there when the accident occurred, and had played there on other occasions within the

observation and to the knowledge of defendant's employees. To the same effect are the following cases: Keffe v. Railway Co., 21 Minn. 207; Railway Co. v. Fitzsimmons, 22 Kan. 686; Koons v. Railroad Co., 65 Mo. 592; Railway Co. v. Dunden, 37 Kan. 1, 14 Pac. 501; Evanisch v. Railway Co., 57 Tex. 123; Ferguson v. Railway Co., 75 Ga. 637, 77 Ga. 102; Railroad Co. v. Bell, 81 Ill. 76.

In many, if not all, of the foregoing turntable cases, stress is laid upon the facts that the turntable was in a public or open and frequented place; that it was dangerous, and left unfastened, and, when in motion, was attractive to children by reason of their love of motion "by other means than their own locomotion"; and that the servants of the railroad companies knew, or had reason to believe, that it was attractive to children, and that children were in the habit of playing on or about it. The doctrine of the cases is that the child cannot be regarded as a voluntary trespasser, because he is induced to come upon the turntable by the defendant's own conduct. "What an express invitation would be to an adult, the temptation of an attractive plaything is to a child of tender years." Keffe v. Railway Co., *supra;* Transit Co. v. Rourke, 10 Ill. App. 474. We are unable to see any substantial difference between the turntable cases and the case at bar. Here was a half block of ground in a populous city, bounded on two sides by public streets, and on the third side by a public alley, with an opening of some 40 feet in the fence, upon the street, on the south side, and an opening of equal dimensions in the fence upon the alley on the north side, with a causeway running from one opening to the other diagonally across the premises, inviting approach, and actually used for passage by men and teams. Upon this half block was a dangerous pond or pit, in which the water was always 5 or 6 feet deep, and sometimes 14 feet deep. Logs and timbers floated about in this pond, and boys had for some time been in the habit of playing upon them in the water. The city authorities had been notified of its attractiveness to children, and of its dangerous character. They not only suffered the pond to remain undrained, but the fences around it to be broken down in some places, and to be actually removed in the others. The deceased boy, Frank McMahon, is proven to have entered the premises at the opening in the fence on the alley. This opening was only 17 feet from the barn of Soady, where he dismounted from the wagon on which he had been riding. The place where he was seen playing in the water was only a few feet from this opening on

the public alley. The love of motion, which attracts a child to play upon a revolving turntable, will also attract him to experiment with a floating plank or log which he finds in a pond within his easy reach. The doctrine of the turntable cases is sustained by other cases where the injuries complained of were caused by agencies of a different character. Such are Mackey v. City of Vicksburg, 64 Miss. 777, 2 South. 178; Birge v. Gardiner, 19 Conn. 507; Daley v. Railroad Co., 26 Conn. 591; Branson v. Labrot, 81 Ky. 638; Powers v. Harlow, 53 Mich. 507, 19 N. W. 257; Hydraulic Works Co., v. Orr, 83 Pa. St. 332; Whirley v. Whiteman, 1 Head, 610.

There are very respectable authorities on the other side of the question here under consideration. Such are Gillespie v. McGowan, 100 Pa. St. 144; Hargreaves v. Deacon, 25 Mich. 1; Kilx v. Nieman, 68 Wis. 271, 32 N. W. 223; Schmidt v. Distilling Co., 90 Mo. 284, 1 S. W. 865; Indianapolis v. Emmelman, 108 Ind. 530, 9 N. E. 155; Clark v. City of Richmond, 83 Va. 355, 5 S. E. 369; Clark v. Manchester, 62 N. H. 220; Frost v. Railroad Co., 64 N. H. 220, 9 Atl. 790. Some of these cases are distinguishable from the case at bar.

DANIELS v. NEW YORK RY.

(154 Mass. 349.—1891.)

LATHROP, J. The plaintiff does not contend that he had any express invitation from the defendant to enter upon its premises, but that he was enticed or allured by the attractiveness of the turntable; and the proposition of law upon which he relies is that, if a railroad company leaves a turntable unlocked or unguarded upon its own premises, near a public highway, or in an open or exposed position near the accustomed or probable place of resort of children, it is for the jury to determine, even in the absence of other evidence as to the attractive nature of the turntable, whether it is, in and of itself, calculated to attract children, and whether a child injured upon it was in fact attracted or allured by it; that, if so allured or attracted, the child comes upon the premises of the railroad company through its implied invitation or inducement, and is not a bare licensee or trespasser; and that the company owes to such child the duty to

refrain from ordinary negligence with respect to the condition and management of its turntable. The turntable is stated in the exceptions to have been five or six hundred feet from a highway crossing the railroad, and six hundred feet from another highway crossing. Shortly before the accident the plaintiff and some other boys were at a station on the railroad, which appears by a plan used at the trial to have been about 1,000 feet from the turntable; that they then asked some trainmen who were switching cars on the tracks adjacent to the turntable to let them ride on the cars, and, being refused, went to the turntable. The only thing stated in the exceptions to show that the turntable was attractive is that it had large upright standards or guys, 12 to 15 feet in height, which could be seen from a considerable distance.

The cases upon which the plaintiff relies may be divided into two classes. Those of the first class rest upon the proposition that, if a turntable is of a dangerous nature and character, when unlocked or unguarded, in a place much resorted to by the public, and where children are wont to go and play, it is the duty of the railroad company owning the turntable to keep the same securely locked or fastened, so as to prevent it from being turned or played with by children, or to keep the same guarded. Stout v. Railroad Co., 2 Dill. 294; Railroad Co. v. Stout, 17 Wall. 657. The decision of the Supreme Court of the Unted States was apparently approved of in Railroad Co. v. Bailey, 11 Neb. 332, and followed in Railway Co. v. Simpson, 60 Tex. 103; Railway Co. v. Styron, 66 Tex. 421; Railway Co. v. McWhirter, 77 Tex. 356. See, also, Bridger v. Railroad Co., 25 S. C. 24; Ferguson v. Railway Co., 75 Ga. 637, 77 Ga. 102.

The second class of cases proceeds upon the doctrine of constructive invitation; that is, that, if a person is allured or tempted by some act of a railroad company to enter upon its land, he is not a trespasser; and it is held that leaving a turntable unguarded is such an act. Keffe v. Railway Co., 21 Minn. 207; O'Malley v. Railway Co., 43 Minn. 289; Railway Co. v. Fitzsimmons, 22 Kan. 686; Nagel v. Railway Co., 75 Mo. 653. The decision of the Supreme Court of the United States in Railroad Co. v. Stout rests upon the proposition stated by Mr. Justice HUNT, "that, while a railway company is not bound to the same degree of care in regard to mere strangers who are unlawfully upon its premises that it owes to passengers conveyed by it, it is not exempt from responsibility to such

strangers for injuries arising from its negligence or from its tortious acts." The cases cited in support of this proposition are Lynch v. Nurdin, 1 Q. B. 29; Birge v. Gardiner, 19 Conn. 507; Daley v. Railroad Co., 26 Conn. 591, and Bird v. Holbrook, 4 Bing. 628. With the exception of Daley v. Railroad Co., all of these cases come within other rules, or within well-defined exceptions to the general rule that a landowner owes no duty to a trespasser, except he must not wantonly or intentionally injure him or expose him to injury. Lynch v. Nurdin, *ubi supra,* rests upon the doctrine that, if a person unlawfully places an obstruction in a way, he is liable to a child who is injured thereby, although the child wrongfully meddles with the obstruction. The contrary, however, was held in Hughes v. Macfie, 2 H. & C. 744, and in Mangan v. Atterton, L. R. 1 Ex. 239. In Lane v. Atlantic Works, 111 Mass. 136, the plaintiff was found to be without fault, and not a trespasser. See, also, Clark v. Chambers, 3 Q. B. Div. 327; Powell v. Deveney, 3 Cush. 300. Birge v. Gardiner, *ubi supra,* rests upon the doctrine that an owner of land has no right to use his land near a highway in such a manner as to make it a public nuisance. To the same effect is Hydraulic Works Co. v. Orr, 83 Pa. St. 332. Bird v. Holbrook, *ubi supra,* decides that landowner cannot lawfully, without giving notice, set traps upon his own land for the purpose of injuring trespassers; and that, if a person is injured by such a trap, he may recover. And in Connecticut the rule is held to be the same, though no notice is given. Johnson v. Patterson, 14 Conn. 1. This, as pointed out by MORTON, J., in Marble v. Ross, 124 Mass. 44, 49, proceeds upon the ground that the owner of land cannot wantonly injure a trespasser. The case of a trespasser injured by a vicious animal stands upon the same footing. Marble v. Ross, 124 Mass. 44. The owner of land adjoining a public street is undoubtedly liable for an excavation made by him therein, if the land, with his consent, has for a long time been used by the public as a street. Larue v. Hotel Co., 116 Mass. 67; Beck v. Carter, 68 N. Y. 283. The case of Daley v. Railroad Co., *ubi supra,* so far as it tends to support the result reached in Railroad Co. v. Stout, *ubi supra,* must be considered as overruled by Nolan v. Railroad Co., 53 Conn. 461.

The Court of Appeals of New York has stated, in a well-considered case, that it does not uphold the decision in Railroad Co. v. Stout, *ubi supra,* and, although it seeks to distinguish that case from the one before it, the difference between the two cases is not very

apparent. McAlpin v. Powell, 70 N. Y. 126. In this case the plaintiff's intestate, a boy in his tenth year, stepped out of a window of the house in which he lived upon the platform of a fire-escape, and fell through a trap-door therein, which was insecurely fastened. The defendant was the landlord of the house, and it was his duty to keep the fire-escape in order. It was held that he owed no duty to one who was using the fire-escape for his own pleasure, and that the defendant was not liable. In Frost v. Railroad Co., 64 N. H. 220, the plaintiff, a boy seven years of age, was injured while playing upon a turntable of the defendant's railroad. The ground upon which he sought to recover was that he was attracted to the turntable by the noise of boys playing upon it. The turntable was on the defendant's land about 60 feet from a public street, in a cut with high, steep embankments on each side, and was insecurely fastened. It was held that the plaintiff was but a trespasser; and that, under the circumstances, the defendant owed him no duty. The court expressly refused to follow the case of Railroad Co. v. Stout, *ubi supra.* On the question whether the defendant was liable on the ground of an implied invitation, CLARK, J., in delivering the opinion of the court, said: "one having in his possession agricultural or mechanical tools is not responsible for injuries caused to trespassers by careless handling, nor is the owner of a fruit-tree bound to cut it down or inclose it, or exercise care in securing the staple and lock with which his ladder is fastened, for the protection of trespassing boys, who may be attracted by the fruit. Neither is the owner or occupant of premises upon which there is a natural or artificial pond, or a blueberry pasture legally required to exercise care in securing his gates and bars to guard against accidents to straying and trespassing children. The owner is under no duty to a mere trespasser to keep his premises safe, and the fact that the trespasser is an infant cannot have the effect to raise a duty where none otherwise exists."

Subject to the exceptions we have before stated, and to some others which it is not necessary more particularly to refer to, an owner of land may use his land in such manner as he sees fit; and if a trespasser or mere licensee is injured he cannot complain that, if the owner had used it in a more careful manner, no injury would have resulted. Hounsell v. Smyth, 7 C. B. (N. S.) 731, and cases cited; Clark v. Manchester, 62 N. H. 577; Klix v. Nieman, 68 Wis. 271; Gramlich v. Wurst, 86 Pa. St. 74; Cauley v. Railway Co., 95

Pa. St. 398; Gillespie v. McGowan, 100 Pa. St. 144; Hargreaves v. Deacon, 25 Mich. 1. See, also, Sweeny v. Railroad Co., 10 Allen, 368; Metcalfe v. Steamship Co., 147 Mass. 66, and cases cited; Barstow v. Railroad Co., 1143 Mass. 535. In Johnson v. Railroad Co., 125 Mass. 75, the plaintiff bought a ticket of the defendant corporation which entitled her to be carried from Boston to Lawrence. She went as far as Somerville, a way station, and there left the cars, and went to a house near by, intending to take a later train for Lawrence. After remaining at the house for a while, she returned to the station, and while crossing the tracks to the station of another railroad corporation to meet her son, was injured. The space between the two stations was partly planked and partly filled in with earth so as to form a convenient passage-way; and evidence was offered that a large number of passengers were in the habit of using this space as the plaintiff was using it, and that no notice or warning to the contrary had been posted. It was held that the evidence failed to show that the defendant held out any inducement to the plaintiff to enter its premises; that the use of the premises as a passage-way by strangers was a matter in which the defendant was absolutely passive, and from which nothing was to be inferred in favor of or in aid of the plaintiff; and that the plaintiff was a mere intruder, and could not recover. See, also, Wright v. Railroad Co., 129 Mass. 440. In Morrissey v. Railroad Co., 126 Mass. 377, a child, four years of age was run over by the cars of a railroad corporation while using the track as a playground. There was a foot-path across the track which was used by persons, but in which the plaintiff had no rights, and by which he got upon the track. Evidence was offered that the defendant had been notified that the place was dangerous for children, and had been requested to place a fence across the track. The court held that the plaintiff was a mere trespasser upon the track; that no inducement or implied invitation had been held out to him; and that he could not recover. There was some evidence in this case that the engineer acted maliciously, or with gross and willful carelessness; and this question was submitted to the jury, who found for the defendant.

In Wright v. Railroad Co., 142 Mass. 296, there was a well-defined path leading to a railroad track, and an opening in a ridge near the track, and a passage-way for the path through the ridge. There was no fence or obstruction to prevent persons from going on the track from the path, and when freight cars stood on the track an

opening opposite the path was sometimes left. This path had been used by persons to cross the track, and no objection had been made by the defendant's servants to persons crossing there, except when cars were approaching. The plaintiff, a boy between six and seven years of age, was injured while going to school, and crossing the track by the path. It was held that these facts would not warrant the jury in finding that the defendant had held out an inducement or invitation to the plaintiff to use the path to cross the track. The case of McEachern v. Railroad Co., 150 Mass. 515, came up on demurrer to the declaration, which alleged, in substance, that the defendant, a railroad corporation, left a car standing on one of several side tracks adjoining a public street; that the defendant knew that one of the doors of the car was insecurely fastened, and was liable, upon receiving a slight touch, to fall to the ground; that the defendant well knew that said car "then was, and would be, an enticing, attractive, and inviting object to children, and well knowing that children then were, and long prior thereto had been, accustomed to play in, upon, around, and about such cars as might happen from time to time to be placed upon any of said side tracks;" that the plaintiff, being then upwards of 11 years of age, was traveling upon the street in the vicinity of the side track upon which the car was standing, "and saw said car with its open door, and was thereby enticed and invited to look into said car, and thereupon did undertake to look into said car, exercising therein as much care as could reasonably be expected of a child of his years and capacity; and that in attempting to look into said car he carefully touched said door, and immediately said door fell upon him," and injured him. The demurrer was sustained, on the ground that the plaintiff was a trespasser, committing an unlawful act in meddling with the defendant's car; that he was not invited or enticed there by the defendant; and that the defendant owed him no duty to have the car safe for him to visit. In McCarty v. Railroad Co., 154 Mass. 17, a child about five years old strayed from the yard of the house in which it lived onto a street, and thence into the freight yard of a railroad corporation, where it was injured. The freight yard was parallel with the street, and there was no fence between. It was held, in the absence of evidence that a fence was required by Pub. St. c. 112, § 115, that it did not appear that there was any evidence of a breach of any duty which the defendant owed the plaintiff. The cases which we have last cited are conclusive of the one at the bar,

whatever may be the rule elsewhere. The plaintiff was a mere trespasser upon the land of the defendant. We find no evidence of any invitation by the defendant or inducement held out to him to go there, and no evidence of a breach of any duty which it owed him. The Superior Court rightly directed a verdict for the defendant.

Exceptions overruled.

SAVANNAH, F. & W. RY. CO. v. BEAVERS.

(113 Ga. 398; 39 S. E. 82.—1901.)

FISH, J. A. A. Beavers obtained a verdict and judgment against the Savannah, Florida & Western Railway Company for the death of his minor child, and, upon the defendant's motion for a new trial being overruled, it excepted. There was but little conflict in the evidence, and that in behalf of the plaintiff conduced to establish the following facts: The defendant railway company undertook to construct a water tank upon its premises. The work was temporarily suspended, and an excavation 12 feet square, about 7 feet deep, and containing about 4 or 5 feet of muddy water, concealing its depth, was left uncovered, and guarded only by piling placed around it, some 18 inches in height. Upon the sides of the excavation, and 2 feet from the surface, there was a ledge or sill, 5 by 10 inches. There was a ladder and a long-handled pump left in the excavation, the ladder extending to the top. Near by there was a tram road upon which there was a small flat car, used for hauling away dirt taken from the hole. Eight and a half feet from the edge of the excavation, and along the outer line of the defendant's right of way, there ran a footpath, much traveled by the public. Some 28 feet from the excavation there was a canal, along the banks of which there were berries and flowers, which children were accustomed to gather. There were no flowers nor berries immediately about the excavation. It did not appear that the officers of the defendant company knew that children frequented the locality. The foreman of the "gang," while making the excavation, saw children gathering flowers and berries along the banks of the canal and observing the progress of the work, but of this he never informed the officers of the company. No one lived nearer to the excavation than 100 yards

away. The public street was about 100 yards distant therefrom. plaintiff's two sons, one 9 and the other 5 1-2 years old, went, with two other boys, the elder of whom was 11 years of age, to the excavation to play with frogs, and while the younger son of plaintiff was standing on the ledge, inside the hole, engaged in such childish sport, he fell into the water, and was drowned. All of these boys had been playing with the frogs in the excavation for several days prior to the accident, but there was no evidence that any of the company's officials had knowledge of this fact. A day or two before the accident a man passing by warned these boys to get away from the excavation or they would get hurt. In going to this place the boys did not use the footpath. Neither plaintiff nor his wife knew of the existence of the excavation.

Under the facts stated, was the defendant company liable in damages to the plaintiff for the death of his child? This question turns upon another; that is, whether or not the company owed the child any legal duty which it neglected to perform, for there can be no actionable negligence without the breach of a legal duty. * * *

Among the cases relied on by the defendant in error is that of Ferguson v. Railway Co., 75 Ga. 637 (Id. 77 Ga. 102), wherein this court held: "Where a railroad company leaves a dangerous machine, such as a turntable, unfastened in a city, on a lot which is not securely inclosed, and where people and children are wont to visit it and pass through it, this is negligence on the part of such company; and where an infant of ten or twelve years of age resorted to the turntable, and in riding upon it was dangerously and seriously injured, the railroad company is liable for damages for such injuries to the infant." The rule of the so-called "turntable cases" has been adopted by many of the courts, by others it has been severely criticised, and by some wholly repudiated. Some of the courts which have recognized the rule have limited its operation strictly to turntables and other dangerous and attractive machinery.

It has been repudiated by the courts of last resort in New Hampshire, Tennessee, Massachusetts, New York, and New Jersey. See Frost v. Railroad Co., 64 N. H. 220, 9 Atl. 790, 10 Am. St. Rep. 396; Bates v. Railway Co., 90 Tenn. 36, 15 S. W. 1069, 25 Am. St. Rep. 665; Daniels v. Railroad Co., 154 Mass. 349, 28 N. E. 283, 13 L. R. A. 248; Walsh v. Railroad Co., 145 N. Y. 301, 39 N. E. 1068, 27 L. R. A. 724; Railroad Co. v. Reich (N. J. Err. & App.) 40 Atl. 682, 41 L. R. A. 831. Liability was also denied in Railroad Co. v.

Bell, 81 Ill. 76, 25 Am. Rep. 269, on account of "the isolated position" of the turntable in question.

The rule was recognized in Keffe v. Railway Co., 21 Minn. 207, 18 Am. Rep. 393, wherein Mr. Justice YOUNG pronounced perhaps the ablest opinion ever delivered in support of the doctrine. The same court, however, in Twist v. Railroad Co., 39 Minn. 164, 39 N. W. 402, 12 Am. St. Rep. 626, clearly intimated that the doctrine of "the turntable cases" ought not to be extended; and in Stendal v. Boyd, 67 Minn. 279, 69 N. W. 899, said: "We did not mean by [what was said in Twist v. Railroad Co.] that we would not apply the doctrine to any but turntable cases, but merely that we would not extend the doctrine to cases which, upon their facts, did not come strictly and fully within the principle upon which those cases rest. We would not extend it to an ordinary case of a landowner merely allowing a pool of water or pond to stand on a vacant lot. To bring a case of such a pond within the principle of these cases, it would have to be exceptional and peculiar in its circumstances." And in Ratte v. Dawson and Dehanitz v. City of St. Paul (Minn) 76 N. W. 48, and in Haesley v. Railroad Co., 46 Minn. 233, 48 N. W. 1023, 24 Am. St. Rep. 220, the principle was considerably limited in its application. In the last-mentioned case the court held: "A railway company, maintaining what is known as a 'gravity' yard or side track, has undoubtedly performed its duty as to a trespassing child of tender years, strictly not *sui juris*, when it securely fastens, by means of the ordinary appliance or brake, such cars as it may have occasion to place upon the grade of its track." In Koons v. Railroad Co., 65 Mo. 592, the doctrine of "the turntable cases" was followed, but it was limited, in Overholt v. Vieths, 93 Mo. 422, and again in Barney v. Railroad Co., 126 Mo. 372, 28 S. W. 1069, 26 L. R. A. 847, where the court held: "Railroad cars and similar machinery are not 'dangerous machines,' within the meaning of the rule declaring turntables to be such;" and also in Witte v. Stifel, 126 Mo. 295, 28 S. W. 891, where it was held: "The owner of a building in process of construction in a city is not liable for injuries to a child playing thereat without his knowledge, and without any inducement or invitation, implied or otherwise, on his part to the child to go upon the premises." In Railway Co. v. Fitzsimmons, 22 Kan. 686, 31 Am. Rep. 203, and Railway Co. v. Dunden, 37 Kan. 1, 14 Pac. 501, the doctrine of "the turntable cases" is recognized; but in Railroad Co. v. Bockoven, 53 Kan. 279, 36 Pac. 322, where

it appeared that a child was killed by falling off a defective gate of a railroad company, upon which it was swinging, the court said: "We are not willing to extend the rule declared by this court in the Fitzsimmons and Dunden Cases. In some of the courts the rule in those cases has been questioned, and in others denied."

In Evansich v. Railway Co., 57 Tex. 126, and other cases decided by the supreme court of that state, the turntable rule has been followed; but in Railroad Co. v. Dobbins (Tex. Civ. App.) 40 S. W. 861, affirmed by the supreme court of Texas (41 S. W. 62), the rule is sharply criticised, the latter court holding: "The common law does not impose upon the owner of property the duty to use care to keep his premises in such a condition that a child of tender years going thereon may not be injured. * * * A railroad company which constructs a platform for the reception of freight and passengers, and a path of plank leading thereto, would not be liable to any one who fell from the path into an excavation, who was not going to or from the platform on business connected with the company." There it appeared that plaintiff's child, less than three years old, fell in such excavation, and was recognized also in Barrett v. Southern Pac. Co., 91 Cal. 296, 27 Pac. 666, 25 Am. St. Rep. 186; but in Peters v. Bowman, 115 Cal. 345, the rule was not extended to a case where a child trespassing upon an unguarded lot fell into a pond thereon and was drowned. The rule was also recognized in Railroad Co. v. Bailey, 11 Neb. 332, 9 N. W. 50; but, in Richards v. Connell, 45 Neb. 467, 63 N. W. 915, it was not applied where the child of the plaintiff was trespassing upon the lot of the defendant, and was drowned by falling from a raft on a pond thereon. Adopting what we believe to be the wise course of these courts in limiting the doctrine of "the turntable cases," we hold that the case of Ferguson v. Railway Co., *supra,* is not authority which is applicable to the facts of the case under consideration. Our conclusion is that the evidence in this case does not disclose the breach of any duty lawfully due from the defendant railway company to the deceased child, and consequently did not warrant a finding that his death was occasioned by its negligence. Irrespective, therefore, of other questions presented, the verdict in favor of the child's father was without evidence to support it, and the trial court erred in not setting it aside.

As supporting the rule that the owner or occupier of land owes no duty of immunities to trespassing children, see the following cases and authorities therein cited: Railroad Co. v. Henigh, 23 Kan.

347, 33 Am. Rep. 167; Green v. Linton (City Ct. Brook.) 27 N. Y. Supp. 891; Powers v. Creem (Sup.) 48 N. Y. Supp. 21; Newdoll v. Young, 80 Hun, 364, 30 N. Y. Supp. 84; McAlpin v. Powell, 70 N. Y. 126, 26 Am. Rep. 555; Sterger v. Van Sicklen, 132 N. Y. 499, 30 N. E. 987, 16 L. R. A. 640; Murphy v. City of Brooklyn (N. Y. App.) 23 N. E. 887; Severy v. Nickerson, 120 Mass. 306, 21 Am. Rep. 514; McEachern v. Railroad Co., 150 Mass. 515, 23 N. E. 231; McGuiness v. Butler, 159 Mass. 233, 34 N. E. 259; Gay v. Railway Co., 159 Mass. 238, 34 N. E. 186, 21 L. R. A. 448; Holbrook v. Aldrich, 168 Mass. 15, 46 N. E. 115, 36 L. R. A. 493; Galligan v. Manufacturing Co. (Mass.) 10 N. E. 171; Breckenridge v. Bennett (Com. Pl.) 7 Kulp, 95; Rodgers v. Lees, 140 Pa. 475, 21 Atl. 399, 12 L. R. A. 216; Bridge Co. v. Jackson, 114 Pa. 321, 6 Atl. 128; Talty v. City of Atlantic, 92 Iowa, 135, 60 N. W. 516; Ritz v. City of Wheeling (W. Va.) 31 S. E. 993, 43 L. R. A. 148; Fredericks v. Railroad Co., 46 La. Ann. 1180, 15 South. 413; O'Connor v. Railroad Co., 44 La. Ann. 339, 10 South. 678; Railway Co. v. Cunningham, 7 Tex. Civ. App. 65, 26 S. W. 474; Oil Co. v. Morton, 70 Tex. 400, 7 S. W. 756; Railway Co. v. Edwards, (Tex. Sup.) 36 S. W. 430, 32 L. R. A. 825; Slayton v. Railroad Co., 40 Neb. 840, 59 N. W. 510; Vanderbeck v. Hendry, 34 N. J. Law, 467; Phillips v. Library Co. (N. J. Err. & App.) 27 Atl. 478; Fitzpatrick v. Manufacturing Co. (N. J. Sup.) 39 Atl. 675; Benson v. Traction Co., 77 Md. 536, 26 Atl. 973, 39 Am. St. Rep. 436; Kayser v. Lindell (Minn.) 75 N. W. 1038; Dehanitz v. City of St. Paul (Minn.) 76 N. W. 48; Buch v. Manufacturing Co. (N. H.) 44 Atl. 809; Robinson v. Railway Co., 7 Utah, 493, 27 Pac. 689, 13 L. R. A. 765; Charlebois v. Railroad Co., 91 Mich. 59, 51 N. W. 812; Moran v. Palace Car Co. (Mo. Sup.) 36 S. W. 659, 33 L. R. A. 755; Clark v. City of Richmond, 83 Va. 355, 5 S. E. 369, 5 Am. St. Rep. 281; City of Indianapolis v. Emmelman, 108 Ind. 530, 9 N. E. 155.

Judgment reversed. All the justices concurring.

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W Ministerial acts (Reg III).

An act performed in a prescribed manner, in obedience to the law or mandate of legal authority, without regard to, or the exercise of, the judgment of the individual upon the propriety of the acts being done.

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